ELEMENTS

OF THE

LAW OF PARTNERSHIP

BY

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PREFACE.

Several years ago the writer printed for the use of his class a brief course of lectures on Partnership. A wider demand for them having sprung up, they have been revised and reprinted in the hope that they may be useful to students elsewhere. They pretend to be nothing more than the mere elements of the subject, and the endeavor has been to keep them in small compass. The citation of authorities has been purposely limited to the leading and most readily accessible cases, and those cited have been selected rather as illustrations of the text than as authorities for it. Much statement of cases in the text has been avoided, because the lectures were designed to be used and were in fact used in connection with a volume of selected cases upon the subject.

It is assumed that the study of Agency will precede that of Partnership, and some knowledge of the former subject has been constantly taken for granted. If the style at times seems to be didactic, the circumstances of the original composition will serve as an explanation.

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ADDENDA.

INTRODUCTION.

Relation to other subjects.— The law of Partnership, of which we are now to begin the study, is one of the most interesting and important branches of commercial law. It appropriately follows the law of Agency, of which it is often said to be a part. It belongs to that class of personal relations, heretofore spoken of, which are created, not by law, but by the contract of the parties.

Historical.—It is of ancient origin. It was known to the Romans and highly developed. It was adopted and regulated by statutes in the commercial cities of Europe, and was from thence engrafted upon the English common law. Since its incorporation into the latter system it has lost many of its former characteristics and has acquired others which were entirely unknown to it in its origin.

Bibliographical.— It has been treated by many writers — among English writers by Archbold, Collyer, Dixon, Fox, Lindley and Pollock; and among American writers by Bates, Parsons (Theophilus), Parsons (James) and Story. The leading text-books now in use in this country are Bates on Partnership, a recent and very excellent American work in two volumes; Ewell's Lindley, an American edition of the leading English work, in two volumes, and highly valuable; Wentworth's Lindley, an excellent edition in one volume; and Parsons (T.) on Partnership, a concise but excellent one volume work, of which a new edition has recently been

issued; and Story on Partnership. The subject of Limited Partnership has also been treated by Mr. Bates, in a separate volume.

Codification.— In England and several of the states the law of partnership has been, to a greater or less extent, reduced to the form of a statute. These statutes or codes are of course authoritative in their respective jurisdictions, but they furnish elsewhere an excellent subject of study in comparison with common-law rules. The most important of these statutes are given in Appendix A.

THE LAW OF PARTNERSHIP.

CHAPTER I.

DEFINITIONS AND DISTINCTIONS.

§ 1. Partnership defined.— Partnership is a legal relation, based upon the express or implied contract of two or more competent persons to unite their property, labor or skill in carrying on some lawful business as principals for their joint profit. The persons so united are called *partners*. The term *copartnership* is sometimes used to designate the relation, and the term *copartners* to designate the parties. The partners collectively are often called the *firm*.

Any attempt to frame a satisfactory definition of partnership is probably a somewhat hazardous undertaking. This is partly owing to the difficulty inhering in any attempt at definition, but it is chiefly attributable to the fact that the legal conception of partnership has not always been clear and definite, and that the legal test for determining the existence of the relation has varied from time to time. Mr. Justice Lindley, in his admirable treatise upon the subject,[1]

[1] Lindley on Partnership (Ewell's ed.), vol. I, p. 1.

declines to attempt a definition, saying that to frame one "which shall be both positively and negatively accurate is possible only to those who, having legislative authority, can adapt the law to their own definition." He collects, however, no fewer than nineteen definitions which have been given by other writers; and some of the most important of these are reproduced in the foot-note.[1]

§ 2. Same subject — The essential elements. — These several definitions vary in minor particulars, but from them all at least the characteristic elements of partnership may be gathered. Thus —

1. It is an unincorporated association or legal relation.
2. It is created not by law but by the agreement of the parties.

[1] "A partnership is the contract relation subsisting between persons who have combined their property, labor or skill in an enterprise or business as principals for the purpose of joint profit." — Bates.

"Partnership, as between the parties themselves, is a voluntary contract between two or more persons for joining together their money, goods, labor and skill, or any or all of them, under an understanding that there shall be a communion of profit between them, and for the purpose of carrying on a legal trade, business or adventure." — Collyer.

"Partnership, often called copartnership, is usually defined to be a voluntary contract between two or more competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them." — Story.

"We define partnership as the combination by two or more persons of capital, or labor, or skill, for the purpose of business for their common benefit." — Parsons.

The latest editor of Mr. Parsons' book, Mr. Beale, substitutes the following: "Partnership is a legal entity formed by the association of two or more persons for the purpose of carrying on business together and dividing its profits between them."

The new English "Partnership Act" defines the relation thus: "Partnership is the relation which subsists between persons carrying on a business in common with a view of profit."

See, also, the remarks of Sir George Jessel, M. R., in Pooley v. Driver (1876), Law Reports, 5 Ch. Div. 458, Ames' Cases on Partnership, 87; and the case of Queen v. Robson (1885), 16 Q. B. Div. 137, Paige's Cases on Partnership, 11.

3. It requires two or more competent parties.

4. It involves the establishment of a common stock, fund or capital of some sort by the union of the several contributions of the parties.

5. It contemplates the transaction of some lawful business, trade or occupation, which the parties are to own and carry on as principals.

6. The purpose of the union is the pecuniary gain of the members.[1]

In several of the definitions, partnership is spoken of as a contract. It is, however, rather the result of the contract than the contract itself; it is the relation or association which the contract creates.

§ 3. **Is a contract relation.**— Partnership is a contract relation and not a status.[2] In this respect it resembles agency. It is created, limited, regulated and terminated, as between the parties themselves, by their contract. The law does not create partnership, or arbitrarily presume its existence.[3] As has been seen in the study of agency,[4] authority in one person to bind another as his agent is sometimes said to be created by law; but this is not true in the law of partnership. One individual may, it is true, be held liable to particular persons as a partner, by estoppel, but this liability, as will be seen hereafter,[5] is limited to those only in

[1] An association organized, not for gain, but for the accomplishment of some social or religious purpose, as, for example, a Young Men's Christian Association, is not a partnership. Queen v. Robson (1885), 16 Q. B. Div. 137; Paige's Partnership Cases, 11. See, also, § 7, *post*.

[2] Bates on Partnership, vol. I, § 2. Mr. James Parsons, in his work on the Principles of Partnership (Boston, 1889), § 101, does indeed declare the contrary, distinguishing in this respect agency and partnership. Agency, he asserts, is not a status but a contractual relation, while partnership is the reverse. It is believed, however, that the two relations are alike contractual.

[3] Phillips v. Phillips (1863), 49 Ill. 437, Paige's Cas. 15; Re Gibbs' Estate (1893), 157 Pa. 59, 27 Atl. Rep. 383, 22 L. R. A. 276. Compare Phillips v. Phillips, *supra*, with Ratzer v. Ratzer (1877), 28 N. J. Eq. 136.

[4] Mechem on Agency, §§ 1, 83.

[5] *Post*, § 71.

whose favor the estoppel operates, and does not make such individual an actual partner, nor amount to the general creation of a partnership between him and those with whom he was reputed to be associated. As a general rule there can be no partnership where the parties have not by their agreement created one.

§ 4. **Is a partnership a distinct entity?** — A partnership is sometimes said to be a legal entity separate and distinct from the persons composing it, but from a legal standpoint this can be true only in a limited sense. For most purposes the law regards only the individuals who occupy the relation; though by statute in many states the partnership itself is regarded by the law as a distinct entity for a few special purposes, as in the case of taxing acts, acts providing for the filing of chattel mortgages, and, occasionally, acts permitting process to run against the partnership as such.[1] In most other cases, when the partnership is spoken of as a separate, legal entity, having its own property, creditors and the like, little more is meant as a legal proposition than that the partners as such have special rights and liabilities which are worked out through their partnership relation.[2]

§ 5. **Same subject — The commercial conception of partnership.** — The commercial conception of a partnership is

[1] See Faulkner v. Hyman (1886), 142 Mass. 53; Robertson v. Corsett (1878), 39 Mich. 777; Fitzgerald v. Grimmell (1884), 64 Iowa, 261; Walker v. Wait (1878), 50 Vt. 668.

[2] In Meehan v. Valentine (1891), 145 U. S. 611, the court, referring to the case of Pooley v. Driver, L. R. 5 Ch. Div. 458, says: "In the case last above cited Sir George Jessel said: 'You cannot grasp the notion of agency, properly speaking, unless you grasp the notion of the existence of the firm as a separate entity from the existence of the partners; a notion which was well grasped by the old Roman lawyers, and which was partly understood in the courts of equity.' And in a very recent case the court of appeals of New York, than which no court has more steadfastly adhered to the old form of stating the rule, has held that a partnership, though not strictly a legal entity as distinct from the persons composing it, yet being commonly so regarded by men of business, might be so treated in interpreting a commercial contract. Bank of Buffalo v. Thompson, 121 N. Y. 280."

undoubtedly different. "Commercial men and accountants," says Mr. Justice Lindley, "are apt to look upon a firm in the light in which lawyers look upon a corporation, *i. e.*, as a body distinct from the members composing it, and having rights and obligations distinct from those of its members. Hence, in keeping partnership accounts, the *firm* is made debtor to each partner for what he brings into the common stock, and each partner is made debtor to the firm for all that he takes out of that stock. In the mercantile view, partners are never indebted to each other in respect of partnership transactions, but are always either debtors to or creditors of the firm. . . . The partners are the agents and sureties of the firm: its agents for the transaction of its business; its sureties for the liquidation of its liabilities so far as the assets of the firm are insufficient to meet them. The liabilities of the firm are regarded as the liabilities of the partners only in case they cannot be met by the firm and discharged out of its assets. But this is not the legal notion of a firm. The firm is not recognized by lawyers as distinct from the members composing it."[1]

Though the legal and the mercantile views are thus distinct, there is in many quarters a growing tendency to incorporate the mercantile conception in the legal theory as largely as the inherent nature of the partnership will permit; and though the practical consequences of the changed conception are usually not pronounced, it often aids in a clearer conception of the relative rights and powers of the firm collectively and the partners as individuals.[2]

[1] Lindley on Partnership (Ewell's 2d Am. ed.), vol. I, p. 110.

[2] But there is great practical difficulty in completely adopting the mercantile theory. Thus in Ex parte Beauchamp (1894), 1 Q. B. 1, where a receiving order in bankruptcy had been made against a firm composed of an adult and an infant, Kay, L. J., said: "The receiving order is made against the firm, and the case has been argued as though the firm had a separate existence as distinguished from the individual members of the firm; in other words, as if it were a corporation having a separate existence from the individuals which compose it. It is no such thing, and the rules [permitting proceed-

§ 6. How a partnership differs from a corporation.— A partnership differs in material respects from a corporation.

A partnership is a voluntary, unincorporated association of individuals whose legal relation is based upon their agreement, and needs no special statutory authority to give it force and effect. They continue to act in this relation as individuals. They sue and are sued only in their individual names. The death of one operates usually to terminate the relation. The transfer of the interest of one has usually the same effect, and operates, not to introduce the transferee into the relation, as a party to it, but merely to give him such share as his transferrer would have upon a dissolution. Each partner is, in general, personally responsible for all the debts of the partnership, notwithstanding that he has fully paid in to it his agreed contribution.

A corporation, on the other hand, is a distinct legal entity, created by some express legislative authority, either special to the particular case or general in like cases. It acts in its corporate capacity only, without regard to the individuals who compose it. It may sue and be sued in its own name. The death of one or more corporators does not dissolve it. One corporator may transfer his share without affecting the corporate existence, and his transferee may take his place in the corporation, which proceeds without regard to changes in the *personnel* of the corporators. One corporator, having paid his subscription, is not usually subject to any further personal responsibility for the debts of the concern. In these characteristics of limited liability, facility of transfer, and

ings in the firm name] do not mean anything of the kind. Under the rules, facilities have been given for proceeding against a firm in the firm name, for this simple reason — that it is not always easy to find out who who are the partners in a firm." (See, also, Drucker v. Wellhouse (1888), 82 Ga. 129, 8 S. E. Rep. 40, 2 L. R. A. 328; Harris v. Visscher, 57 Ga. 229; Chambers v. Sloan, 19 Ga. 84.) So in a late case in New York — Jones v. Blun (1895), 145 N. Y. 333 — the court, notwithstanding what was said in Bank of Buffalo v. Thompson, *supra*, points out that it is only for certain purposes that the partnership may be regarded as an entity.

immunity from dissolution by death, are found the leading inducements to the formation of corporations.

§ 7. Intermediate associations.— In many of the states, statutes have provided for the organization of associations partaking more or less of the characteristics of both partnerships and corporations. Thus, there are *joint-stock companies*, which usually are simply partnerships with transferable shares; *partnership associations, limited*, which are usually but a crude form of corporation; and *limited partnerships*, which are partnerships having one or more general members subject to the usual liabilities of partners, and also one or more special partners whose liability is limited to the amount contributed. The legal peculiarities of these several types will be more fully considered in later chapters.

In addition to these are other bodies, not statutory, and not organized for the purpose of pecuniary profit, which are sometimes sought to be held liable as partnerships, but which are not such in fact. Of these the unincorporated social clubs, committees, lodges, fraternal societies, christian associations, granges and co-operative associations, are common examples. Such bodies are not partnerships, nor is the liability of a member to be determined by the law of partnership, but by that of principal and agent — those, and those only, being liable as principals who have expressly or impliedly authorized acts to be done in their behalf, or who have subsequently ratified them.[1]

§ 8. Joint-tenancy and co-ownership. — Joint-tenants and co-owners are not thereby partners.[2] They differ in

[1] Flemyng v. Hector (1836), 2 Mees. & Wels. 172; Todd v. Emly (1841), 7 id. 427; S. C., 8 id. 505; Laford v. Deems (1880), 81 N. Y. 507; Eichbaum v. Irons (1843), 6 Watts & Serg. (Pa.) 68, 40 Am. Dec. 540; Ash v. Guie (1881), 97 Pa. St. 493, 39 Am. Rep. 818, Mechem's Cas. on Ag. 45; Davison v. Holden (1887), 55 Conn. 103, 3 Am. St. Rep. 40, Mechem's Cas. on Ag. 47; Burt v. Lathrop (1883), 52 Mich. 106.

[2] See 1 Lindley on Partn. (Ewell's 2d Am. ed.), p. 52; Dunham v. Loverock (1893), 158 Pa. St. 197, 27 Atl. Rep. 990, 38 Am. St. Rep. 838.

many particulars, of which the following are the most important:

1. Co-ownership is not necessarily the result of an agreement to create it,[1] while partnership is.[2]

2. Co-ownership does not necessarily involve community of profit or loss,[3] while partnership does.[4]

3. One co-owner may, without the consent of the others, assign his interest in such a way that his assignee will assume his relations to the other co-owners,[5] but one partner cannot do this.[6]

4. One co-owner is not as such the agent of the others,[7] while a partner is.[8]

5. One co-owner has no lien on the common property for expenses or outlays, or for what may be due from the others as their share of a common debt,[9] while a partner has such a lien.[10]

Other distinctions exist, but these are sufficient to illustrate the differences.

But while the legal distinction between partnership and co-ownership as such is thus clearly defined, it is possible that the co-owners may so deal with their common property as to assume very nearly, if not entirely, the attitude of partners. Thus, when they employ it in business with a view to profit, and divide such profits between them, partnership may result.[11] Even the division of the gross proceeds of the employment of their common property was formerly deemed sufficient to render them liable as partners, though this view is now generally abandoned, as will be seen in a later section.[12] Until, however, it appears that they have

[1] Lindley on Partnership, *supra*.
[2] See *ante*, § 3; *post*, § 48.
[3] Lindley, *ubi supra*.
[4] See *post*, §§ 46–48.
[5] Lindley, *ubi supra*.
[6] See *post*, § 29.
[7] Lindley, *supra*.
[8] See *post*, § 164.
[9] Lindley, *supra;* Goell v. Morse (1879), 126 Mass. 480.
[10] See *post*, § 278.
[11] See *post*, § 53; Butler Savings Bank v. Osborne (1898), 159 Pa. St. 10, 28 Atl. Rep. 163, 39 Am. St. Rep. 665.
[12] See *post*, §§ 56, 57.

changed their position to that of partners, their relation as co-owners will be presumed to continue.[1]

§ 9. Joint purchasers of goods for resale.[2]— If several persons jointly purchase goods for resale, with a view to divide the profits arising from the transaction, a partnership may thereby be created.[3] But persons who join in the purchase of goods, not for the purpose of selling them again and dividing the profits, but for the purpose of dividing the goods themselves, are not partners, and are not liable to third persons as if they were.[4] And even though they purchase for the purpose of resale, their agreement may show that no partnership was intended, as where they expressly deny to each the ordinary attributes of partnership, such as the power of either to sell without the concurrence of the other.[5]

§ 10. Defectively-organized corporations.— Whether persons are to be held liable as partners who have engaged in business in pursuance of an unsuccessful attempt to organize a corporation is a question upon which the authorities are in conflict. It is contended, on the one hand, that where the association has done business and entered into contracts as a corporation, the individuals composing it cannot, in case it appears that no corporation really existed, be personally liable, because they have never contracted as individuals or intended to be bound as such. To hold them liable as partners would be to hold them upon a contract which they never

[1] Dunham v. Loverock, *supra;* Butler Savings Bank v. Osborne, *supra.*

[2] The language of Mr. Justice Lindley, Ewell's 2d Am. ed., p. 54, is here substantially adopted.

[3] Reid v. Hollinshead (1825), 4 Barn. & Cr. 867, Ames' Cas. on Partn. 29.

[4] Coope v. Eyre (1788), 1 H. Blacks. 37; Hoare v. Dawes (1780), 1 Doug. 371; Gibson v. Lupton (1832), 9 Bing. 297.

[5] Goell v. Morse (1879), 126 Mass. 480. Here two men bought a horse for the purpose of resale at a profit, but it was agreed that either one who should have possession of the horse should feed him at his own expense, and, though each was to endeavor to find a purchaser, neither was to sell without the concurrence of the other. They were held to be tenants in common and not partners.

made or intended to make. On the other hand, it is contended that the parties must have intended to become liable in some way, and inasmuch as they have failed to bind themselves as a corporation, it must be assumed that they are liable as partners — that it is only through the fact that they are corporators and not partners that they escape personal liability; and hence if the corporate shield fails, the individual liability necessarily arises.

§ 11. Same subject — The true test.— The true test, it is believed, according to the weight of modern authority, is to be found in the nature of the facts which have operated to prevent complete incorporation. There can be no corporation without legislative authority. Hence, if there be no statute at all which authorizes such an incorporation as that attempted, or if, though there is the semblance of a statute, it is really void as being repugnant to the constitution, and therefore is no statute in legal contemplation, the attempted incorporation wholly lacks the vital element which would have given it effect, and the association of individuals, which could not possibly be a corporation, will be deemed in law a partnership.[1] It confessedly is not a corporation *de jure;* and it cannot even be deemed a corporation *de facto*, because it never could have been one *de jure*, and no one can be estopped from so alleging.

Where, however, there was ample legislative authority, and the only difficulty is that the statutory formalities have not been fully complied with, an obviously different question is presented. If the associates have endeavored in good faith to comply with the requirements, and have done business as a corporation, there is ample reason why third persons who have dealt with the association on that footing should be estopped from denying its corporate existence. The state which prescribed the formalities may indeed complain of their non-observance; but until it does so, third persons should not be permitted to interfere. Until the state

[1] Eaton v. Walker (1889), 76 Mich. 579, 43 N. W. Rep. 638, 6 L. R. A. 102.

has acted in the matter the weight of modern authority regards the association as at least a corporation *de facto*, and its members are not liable as partners.[1]

The authorities which sustain this rule do not by any means concede that the formalities prescribed may lightly be ignored. There must be an actual and *bona fide* attempt at compliance, and without this the *de facto* corporation will not exist.[2]

[1] Finnegan v. Noerenberg (Knights of Labor Bldg. Ass'n) (1893), 52 Minn. 239, 53 N. W. Rep. 1150, 38 Am. St. Rep. 552, 18 L. R. A. 778, Paige's Cas. on Partn. 24; Snider's Sons' Co. v. Troy (1890), 91 Ala. 224, 8 So. Rep. 658, 24 Am. St. Rep. 887, 11 L. R. A. 515; American Salt Co. v. Heidenheimer (1891), 80 Tex. 344, 15 S. W. Rep. 1038, 26 Am St. Rep. 743; Rutherford v. Hill (1892), 22 Oreg. 218, 29 Pac. Rep. 546, 29 Am. St. Rep. 596, 17 L. R. A. 549; Fay v. Noble (1851), 7 Cush. (Mass.) 192; Ward v. Brigham (1879), 127 Mass. 24, Paige's Cas. on Partn. 20; Planters' Bank v. Padgett (1882), 69 Ga. 159; Gartside Coal Co. v. Maxwell, 22 Fed. Rep. 197; Re Gibbs' Estate (1893), 157 Pa. St. 59, 27 Atl. Rep. 383, 22 L. R. A. 276.

[2] Certain of the cases declare that there must be a "substantial" compliance with the formalities, or a compliance in all "material respects." Kaiser v. Lawrence Savings Bank (1881), 56 Iowa, 104, 41 Am. Rep. 85; Mokelumne Hill Mining Co. v. Woodbury (1859), 14 Cal. 424, 73 Am. Dec. 658; Hurt v. Salisbury (1874), 55 Mo. 310; Bigelow v. Gregory (1874), 73 Ill. 197, Paige's Cas. on Partn. 28. But, as is pointed out in Re Gibbs' Estate (1893), 157 Pa. St. 59, 27 Atl. Rep. 383, 22 L. R. A. 276, "where there has been a substantial compliance with the law, the corporation is, of course, *de jure*." So, in Finnegan v. Noerenberg, cited in the preceding note, the court say: "A substantial compliance will make a corporation *de jure*. But there must be an apparent attempt to perfect an organization under the law. There being such an apparent attempt to perfect an organization, the failure as to some substantial requirement will prevent the body from being a corporation *de jure;* but, if there be user pursuant to such attempted organization, it will not prevent it being a corporation *de facto*." The statute may, however, make strict compliance with some or all of the requirements a condition precedent to the acquisition of any corporate power, and in such cases there cannot be even a *de facto* corporation without compliance. Jones v. Aspen Hardware Co. (1895), — Col. —, 40 Pac. Rep. 457, 29 L. R. A. 143. And in many of the cases, such as those first cited in this note, express prohibitions existed against commencing business as a corporation until certain requirements, like the filing of the articles, were complied with.

The requisites, then, of the *de facto* corporation are these: 1. A valid law under which a corporation with the powers assumed might lawfully be created; 2. An actual and *bona fide* attempt to comply with the prescribed requirements; and 3. The exercise of corporate powers in pursuance of such attempt.

§ 12. **Promoters of companies.**—Promoters of corporations are not partners. Though engaged in endeavoring to secure the organization of a company to carry on business for pecuniary profit, their immediate object is not the transaction of business for mutual gain, and they do not fall within the definition or the purposes of partnership.[1]

§ 13. **Contemplated partnerships.**— A mere intention to form a partnership does not constitute one. Persons, therefore, who are merely contemplating a future partnership, or who have simply entered into an agreement to thereafter become partners, cannot be held liable as partners, nor have they the rights of partners as between themselves. Before this result can ensue the executory agreement must have been executed. As declared in one case,[2] "A marked distinction exists in law between an agreement to enter into the copartnership relation at a future day and a copartnership actually consummated. It is an elementary principle that a partnership in fact cannot be predicated upon an agreement to enter into a copartnership at a future day unless it be shown that such agreement was actually consummated. In the language of the text-books, the partnership must be 'launched.' To constitute the relation, therefore, the agreement between the parties must be an executed agreement. So long as it remains executory the partnership is inchoate, not having been called into being by the concerted action necessary under the partnership agreement. It is undoubt-

[1] See Reynell v. Lewis (1846), 15 Mees. & Welsby, 517; Capper's Case (1851), 1 Sim. (N. S.) 178.

[2] Reed v. Meagher (1890), 14 Colo. 335, 24 Pac. Rep. 681, 9 L. R. A. 455. See, also, Buzard v. McAnulty (1890), 77 Tex. 438, 14 S. W. Rep. 138.

edly true that a partnership *in præsenti* may be constituted by an agreement if it appears that such was the intention of the parties. But where it expressly appears that the arrangement is contingent, or is to take effect at a future day, it is well settled that the relation of partners does not exist, and that, if one or more of them refuse to perform the agreement, there is no remedy between the parties except a suit in equity for specific performance, or an action at law for the recovery of damages, should any be sustained."

§ **14. Same subject.**— The mere time of executing the articles is not conclusive, for persons may become partners at once, if such is the intention, even though partnership articles are thereafter to be executed. The test is the intention. If it is the intention that the parties are not to become partners until the terms have been agreed upon and articles executed, the partnership will not come into existence until that time, unless the condition is waived; but if the terms have been agreed upon, the execution of the articles, or the performance of other conditions, may be postponed or waived, and such a waiver may be presumed where the parties actually begin business as partners before the conditions have been performed.[1]

§ **15. Classification of partnerships.**— Partnerships are sometimes classified as ordinary partnerships, limited partnerships, and joint-stock companies. The peculiarities of the latter have been already noticed. Ordinary partnerships may be divided into (1) *universal*, (2) *general*, and (3) *special* or *particular* partnerships,— a classification corresponding to that of agency, and based upon substantially the same distinctions. An universal partnership is one in which all the property and services of the parties are united, and all profits, however made, are for their joint benefit. A general partnership is one created for the purposes of some

[1] Cook v. Carpenter (1861), 34 Vt. 121, 80 Am. Dec. 670; Hartman v. Woehr (1867), 18 N. J. Eq. 383; Atkins v. Hunt (1843), 14 N. H. 205. Paige's Cas. on Partn. 1.

general kind of business, or of a number of kinds of business. A special or particular partnership is one created for a single transaction or adventure.

It has been thought that an universal partnership could exist only in theory, but several cases have occurred in this country of partnerships which were practically universal. In any event, however, the evidence must be clear to establish such an unusual relation.[1]

§ 16. Classification of partners.— In limited partnerships the partners are either (1) *general*, or (2) *special*, the former standing in the attitude of an ordinary partner, and the latter occupying a peculiar position, prescribed by statute, with a liability limited to his contribution.

In ordinary partnerships, partners may be classified as (1) *active and ostensible;* (2) *secret* or *dormant*, and (3) *nominal.*

An *ostensible* partner, sometimes called a public partner, is one who is held out and known as a partner. An *active* partner is one who actually participates in the conduct of the business. He is usually an ostensible one, but is not necessarily so. A partner may be unknown or concealed and yet active in the management of the business; or he may be both concealed and passive as to the conduct of the business. In the former case he is said to be a *secret* partner, and in the latter case he is called a *silent* or *dormant* partner. A *nominal* partner is a person apparently a partner but not really so. A person who leaves an existing firm is often called a *retiring* partner, while one who enters such a firm is called an *incoming* partner.

[1] See United States Bank v. Binney (1828), 5 Mason (U. S. C. C.), 188; Lyman v. Lyman (1829), 2 Paine (U. S. C. C.), 11; Rice v. Barnard (1848), 20 Vt. 479, 50 Am. Dec. 54; Goesele v. Bimeler (1852), 14 How. (U. S.) 589; Gray v. Palmer (1858), 9 Cal. 616.

CHAPTER II.

FOR WHAT PURPOSES A PARTNERSHIP MAY BE CREATED.

§ 17. **For any lawful business.**— It is the general rule, analogous to that of agency, that a partnership may be created for the purpose of carrying on any lawful business, and that whatever the individual partners might lawfully do if acting separately and in their own behalf, they may lawfully do in partnership. Thus, there may be a partnership for carrying on not only every lawful kind of trade or commerce, but also for farming, mining, lumbering, manufacturing, and the like. Professional occupations like that of the lawyer, physician, dentist and architect may also be carried on in partnership, and there may be a partnership for buying and selling land.[1]

§ 18. **Not for purposes unlawful or opposed to public policy.**— But, as in the case of agency, there are many purposes for which the relation cannot lawfully be created. Thus, a trust personal to one individual cannot be executed by a partnership; public offices cannot be held in partnership; and a partnership cannot be lawfully created for the doing of anything which is illegal, immoral or opposed to public policy. Partnerships, therefore, for the purpose of carrying on a gambling establishment; to speculate in "futures;" to stifle or prevent competition; to carry on a forbidden occupation; to hinder or delay creditors; to carry on trade with belligerents in time of war; to carry on trade in violation of the navigation laws; and the like, are void.[2]

[1] Chester v. Dickerson (1873), 54 N. Y. 1, 13 Am. Rep. 550; Flower v. Barnekoff (1890), 20 Oreg. 137, 25 Pac. Rep. 370, 11 L. R. A. 149; Bates v. Babcock (1892), 95 Cal. 479, 30 Pac. Rep. 605, 29 Am. St. Rep. 133, 16 L. R. A. 745.

[2] See Gaston v. Drake (1879), 14

§ 19. Purposes illegal in part.— A partnership may be organized for a lawful purpose, and yet one or more of its undertakings may be illegal, or it may seek to accomplish lawful ends by unlawful means. In such cases the unlawful part only, if it can be separated from the residue, will be affected by the illegality; if it cannot be separated, the whole must be regarded as unlawful.[1]

§ 20. Effect of illegality.— Courts will not enforce contracts having for their purpose or tending to promote illegal objects. The members of an illegal partnership cannot sue to enforce any contract tainted by the illegality, but actions may be brought against the members of such a partnership by a person who did not participate in the illegality. As between themselves, the law usually leaves the members of an illegal partnership where it finds them, refusing to aid either party. Courts will not, therefore, enforce contribution or compel an accounting of their illegal affairs;[2] though if they have themselves wound up the affairs and agreed upon the account, it is held in some cases that the courts will then compel the partner having the funds in his possession to pay over to his partner the latter's agreed share, even though such funds were acquired in unlawful dealings.[3] The weight of authority, however, denies relief in these cases as well as in the others.[4]

Nev. 175, 33 Am. Rep. 548; Davis v. Gelhaus (1886), 44 Ohio St. 69; Hunter v. Pfeiffer (1886), 108 Ind. 197; Watson v. Fletcher (1850), 7 Gratt. (Va.) 1; Watson v. Murray (1872), 23 N. J. Eq. 257; King v. Winants (1874), 71 N. C. 469.

[1] See Dunham v. Presby (1876), 120 Mass. 285; Anderson v. Powell (1876), 44 Iowa, 20.

[2] Hunter v. Pfeiffer (1886), 108 Ind. 197; Gould v. Kendall (1884), 15 Neb. 549; Woodworth v. Bennett (1870), 43 N. Y. 273, 3 Am. Rep. 706, Paige's Partn. Cas. 96; Read v. Smith (1883), 60 Tex. 379, Paige's Partn. Cas. 91.

[3] Brooks v. Martin (1864), 2 Wall. (U. S.) 70; Crescent Ins. Co. v. Bear (1887), 23 Fla. 50, 11 Am. St. Rep. 331.

[4] Sykes v. Beadon (1879), 11 Ch. Div. 170; Snell v. Dwight (1876), 120 Mass. 9; Jackson v. McLean (1889), 100 Mo. 130, 13 S. W. Rep. 893; Woodworth v. Bennett, *supra*; Hunter v. Pfeiffer, *supra*; Craft v. McConoughy (1875), 79 Ill. 346.

CHAPTER III.

WHO MAY BE PARTNERS.

§ 21. In general, any person competent to contract.— As a general rule, any person may be a partner who is capable of entering into contracts. If he has the legal ability in his own right and in his individual capacity to transact the business contemplated, he may unite with another person to carry on that business in partnership.

This being the general rule, it is unnecessary to pursue it further in respect of normal persons, but in regard to those who labor under some general disability, more particular mention is desirable. Thus —

§ 22. Aliens as partners. — Aliens who are subjects of nations which are at peace with each other may enter into partnership, but not alien enemies. Upon the breaking out of war between their respective countries, however, their capacity is terminated, and their partnership, as will be seen, is suspended if not dissolved.[1]

§ 23. Infants as partners. — An infant may be a partner,[2] but his contract of partnership is voidable, and he may interpose his infancy as a defense against personal liability as a partner. During the continuance of the relation, how-

[1] See *post*, § 250.

[2] Bush v. Linthicum (1882), 59 Md. 344; Adams v. Beall (1887), 67 Md. 53, 1 Am. St. Rep. 379; Dunton v. Brown (1875), 31 Mich. 182; Osburn v. Farr (1879), 42 Mich. 134. He may be the general partner in a limited partnership. Continental National Bank v. Strauss (1893), 137 N. Y. 148, 553, 32 N. E. Rep. 1066.

ever, he has all of the rights and powers of a partner. Thus, he has equal right, with his copartner, to the possession of the assets of the firm; he may collect and pay debts; and may make contracts in the firm name, which, though he may repudiate liability, will be binding upon his adult copartners and upon the partnership assets.[1] He is entitled to an accounting and to his share of the profits like other partners after the payment of the debts.

He may disaffirm his contract of partnership and avoid personal liability as a partner either to his copartner[2] or third persons;[3] but, notwithstanding such disaffirmance, it is held that his interest in the partnership property remains liable to the partnership debts,[4] and if he has paid money for the privilege of being admitted into the business, he cannot, it is held, after continuing in the business for a period, voluntarily withdraw and recover back what he has paid, unless it was procured from him by fraud.[5] The adult partner cannot repudiate firm contracts made by the infant on the ground of the latter's incapacity, but if he has been induced

[1] See Bush v. Linthicum, *supra*, and other cases cited in this section.

[2] Thus his infancy is a good defense to his copartner's action for contribution. Neal v. Berry (1893), 86 Me. 193, 29 Atl. Rep. 987. Whether the infant may disaffirm a partnership obligation to a third person without also repudiating the partnership relation itself seems to be disputed. It is held that he may do so, in Mehlhop v. Rae (1894), 90 Iowa, 30, 57 N. W. Rep. 650. Miller v. Sims (1834), 2 Hill (S. C.), 479, is *contra*.

[3] Bush v. Linthicum, *supra;* Folds v. Allardt (1886), 35 Minn. 488, 26 N. W. Rep. 201; Mehlhop v. Rae (1894), 90 Iowa, 30, 57 N. W. Rep. 650; Foot v. Goldman (1891), 68 Miss. 529, 10 So. Rep. 62; Bixler v. Kresge (1895), 169 Pa. St. 405, 32 Atl. Rep. 414, 47 Am. St. Rep. 920. Although there seems to be some difference of opinion, the weight of authority is to the effect that the infant may disaffirm personal contracts and contracts respecting personal property before as well as after he arrives at maturity. See Adams v. Beall; Folds v. Allardt; Dunton v. Brown, *supra*, and Shirk v. Shultz, *post*.

[4] Lovell v. Beauchamp, 1894, Ap. Cas. 607; Bush v. Linthicum, *supra;* Shirk v. Shultz (1887), 113 Ind. 571; Yates v. Lyon (1874), 61 N. Y. 344; Pelletier v. Couture (1889), 148 Mass. 269, 19 N. E. Rep. 400, 1 L. R. A. 863.

[5] Adams v. Beall (1887), 67 Md. 53, 1 Am. St. Rep. 379. But see Sparman v. Keim (1880), 83 N. Y. 245.

to enter into the partnership by the infant's fraudulent representation that he is of age, he may dissolve the partnership for that reason.

After he becomes of age, the infant partner may ratify the partnership transactions and thus become liable for obligations incurred during his minority. His ratification need not be express unless a statute so requires, but may be inferred from his acts and conduct, as from his dealing with the subject-matter of the contract after attaining majority. Whether his continuing to act as a partner after becoming of age is of itself enough to constitute a ratification has been doubted.[1] In actions by and against the partnership, the infant partner should usually be made a party, though the English and many of the American courts have held it improper to make an infant partner a defendant in an action against the firm.[2]

§ 24. Insane persons as partners.— The partnership contract of an insane person, like his other contracts, is voidable; but if the other party was ignorant of the insanity, and the contract has been executed and appears to be fair, the contract of an insane person cannot be set aside unless the parties can be restored to their original condition.[3]

§ 25. Married women as partners.— At common law, a married woman was incapable of making contracts, except where she had a separate estate or except where her husband was a convicted felon, or was an alien enemy and abroad, or when husband and wife were judicially separated. Her capacity to enter into partnership was subject to the same limitations. In most of the states her incapacity to make

[1] Upon the question of ratification, see Salinas v. Bennett (1890), 33 S. C. 285, 11 S. E. Rep. 968; Dana v. Stearns (1849), 3 Cush. (Mass.) 372.

[2] See 1 Chitty on Pleading, pp. 14 and 50, and notes; 1 Lindley on Partn. (2d Am. ed., Ewell), 74 and notes; Osburn v. Farr (1879), 42 Mich. 134.

[3] See Behrens v. McKenzie (1867), 23 Iowa, 333, 92 Am. Dec. 428; Fay v. Burditt (1882), 81 Ind. 433, 42 Am. Rep. 142. As to the effect of subsequently occurring insanity upon the partnership, see *post*, § 246.

contracts has been more or less removed by statute, and she may enter into partnership with persons other than her husband under substantially the same conditions which now apply to any other of her contracts.[1] She could not, at common law, be a partner with her husband, and, even under the modern statutes, the same disability still continues in most states.[2]

§ 26. **Corporations as partners.**— A corporation has, as such, no implied power to enter into partnership either with an individual, a firm, or another corporation.[3] Authority for this purpose must be expressly conferred.[4] But, within its corporate power, a corporation and an individual may so contract as to incur a joint liability without actually entering into partnership.[5]

[1] Vail v. Winterstein (1892), 94 Mich. 230, 53 N. W. Rep. 932, 18 L. R. A. 515. *Contra*, in South Carolina, Vannerson v. Cheatham (1894), 44 S. C. —, 19 S. E. Rep. 614.

[2] That she cannot be a partner with her husband, see Artman v. Ferguson (1888), 73 Mich. 146, 16 Am. St. Rep. 572, 2 L. R. A. 343; Gilkerson-Sloss Com. Co. v. Salinger (1892), 56 Ark. 294, 16 L. R. A. 526, 35 Am. St. Rep. 105; Seattle Board of Trade v. Hayden (1892), 4 Wash. 263, 16 L. R. A. 530, 31 Am. St. Rep. 919; Fuller v. McHenry (1892), 83 Wis. 573, 18 L. R. A. 512; Bowker v. Bradford (1885), 140 Mass. 521; Payne v. Thompson (1886), 44 Ohio St. 192; Scarlett v. Snodgrass (1883), 92 Ind. 262; Carey v. Burruss (1882), 20 W. Va. 571, 43 Am. Rep. 790. That she may be a partner with her husband, see Suau v. Caffe (1890), 122 N. Y. 308, 25 N. E. Rep. 488, 9 L. R. A. 593; Louisville R. Co. v. Alexander (1894), — Ky. —, 27 S. W. Rep. 981; Belser v. Tuscumbia Banking Co. (1895), — Ala. —, 17 So. Rep. 40; Dressel v. Lonsdale (1892), 46 Ill. Ap. 454; Lane v. Bishop (1893), 65 Vt. 575, 27 Atl. Rep. 499. In Tennessee, see Theus v. Dugger (1893), 93 Tenn. 41, 23 S. W. Rep. 135. In Maine, see Bird Co. v. Hurley (1895), 87 Me. 579, 33 Atl. Rep. 164.

[3] Whittenton Mills v. Upton (1858), 10 Gray (Mass.), 582, 71 Am. Dec. 681; People v. Sugar Refining Co. (1890), 121 N. Y. 582, 18 Am. St. Rep. 843, 9 L. R. A. 33; Gunn v. Railroad Co. (1885), 74 Ga. 509; Hackett v. Multnomah Ry. (1885), 12 Oreg. 124, 6 Pac. Rep. 659, 53 Am. Rep. 327; Mallory v. Oil Works (1888), 86 Tenn. 598, 8 S. W. Rep. 396; Morris Run Coal Co. v. Barclay Coal Co. (1871), 68 Pa. St. 173, 8 Am. Rep. 159.

[4] Butler v. American Toy Co. (1878), 46 Conn. 186.

[5] In Cleveland Paper Co. v. Courier Co. (1887), 67 Mich. 152, 34 N. W. Rep. 556, the court say: "A corporation may, in furtherance of the object of its creation, contract with an individual, though the effect of the contract may be to im-

§ 27. **Firms as partners.**— Two or more firms may enter into partnership, and a firm may also enter into partnership with an individual. As respects third persons, the associating firms ordinarily lose their separate identity, and each member of each firm is liable as a partner in the joint firm; but as between themselves, for the purposes of accounting and the division of profits or losses, the respective firms may be regarded as the partners.[1]

§ 28. **How many partners there may be.**— In the absence of a statute fixing the limit, the partnership may be composed of any number of partners, though there must, of course, be more than one.[2]

§ 29. **Of the delectus personarum.**— Partnership being founded on the agreement of the parties, and being a relation demanding mutual confidence and trust, it is clear that a person cannot become a member of a firm without the consent of the other members. Hence, one partner cannot introduce a third person into the firm without the consent of the others,[3] nor upon the death of one partner can his personal representative become a partner with the survivors, except with their consent.[4] A sale of one partner's interest does not, therefore, make his transferee a partner, but dissolves the firm.[5]

Consent to the admission of new partners or, in case of death, of the personal representative, may be given in advance, as by being stipulated for in the partnership articles.

To the rule requiring this choice of persons (*delectus personarum*) there are two exceptions — one usually statutory,

pose upon the company the liability of a partner."

[1] In re Hamilton (1880), 1 Fed. Rep. 800; Simonton v. McLain (1885), 87 La. Ann. 663; Bullock v. Hubbard (1863), 23 Cal. 495, 83 Am. Dec. 130; Meyer v. Krohn (1885), 114 Ill. 574, 2 N. E. Rep. 495; Meador v. Hughes (1879), 14 Bush (Ky.), 652; Raymond v. Putnam (1862), 44 N. H. 160.

[2] Stirling v. Heintzman (1880), 42 Mich. 449.

[3] Love v. Payne (1880), 73 Ind. 80, 38 Am. Rep. 111.

[4] See *post*, § 245.

[5] See *post*, § 243.

and the other customary, viz., joint-stock companies and mining partnerships. In these a transfer of one partner's share or his death does not operate as a dissolution, but his transferee or representative may be received as a partner.[1]

§ 30. **Of sub-partnerships.**— One or more of the partners of a firm, less than the whole number, may unite with a third person to form a partnership as to the interest of such partner or partners. Such a partnership is frequently called a sub-partnership, and the third person so associating with the partner is often called a sub-partner. "A sub-partnership," says Mr. Justice Lindley,[2] "is, as it were, a partnership within a partnership; it presupposes the existence of a partnership to which it is itself subordinate." It has all of the characteristics of a partnership as between the immediate parties to it, but the third person does not thereby become a partner in the original firm,[3] he is not liable as such to creditors of the original firm,[4] and he has no right of accounting as a partner against the original firm, but only against such members of it as united with him to form the sub-partnership.[5]

[1] Kahn v. Smelting Co., 102 U. S. 641; Skillman v. Lachman (1863), 23 Cal. 198, 83 Am. Dec. 96, and note; Harris v. Lloyd (1891), 11 Mont. 390, 28 Am. St. Rep. 475.

[2] Lindley on Partnership (Ewell's 2d Am. ed.), vol. I, p. 48.

[3] Setzer v. Beale (1882), 19 W. Va. 274; Meyer v. Krohn (1885), 114 Ill. 574, 2 N. E. Rep. 495. See Miller v. Rapp (1893), 135 Ind. 614, 35 N. E. Rep. 963.

[4] Burnett v. Snyder (1880), 81 N. Y. 550, 37 Am. Rep. 527; Riedeburg v. Schmitt (1888), 71 Wis. 644, 34 N. W. Rep. 336; Setzer v. Beale (1882), 19 W. Va. 274. *Contra*, Fitch v. Harrington (1859), 13 Gray (Mass.), 468, 74 Am. Dec. 641.

[5] The sub-partner may, however, acquire such a vested interest in the assets as to give him the right to an accounting upon dissolution. Nirdlinger v. Bernheimer (1892), 133 N. Y. 45, 30 N. E. Rep. 561. "A sub-partnership does not in fact exist where one party furnishes all the capital, receives all the profits, and owns all the assets. Such an arrangement lacks all the essential elements of a partnership. The ostensible partner, in such case, may be held liable to third parties on the ground that he has held himself out as a partner, and they have treated him as such; but he has no interest which will entitle him to an accounting, or to any action at law or in equity against the other party." Webb v. Johnson (1893), 95 Mich. 325, 54 N. W. Rep. 947.

CHAPTER IV.

OF THE CONTRACT OF PARTNERSHIP AND THE EVIDENCE THEREOF.

§ 31. No particular formalities required.— No particular formalities are required in entering into the contract of partnership. By the common law, no official act or ceremony is necessary; sealed instruments are not required, and, except in those cases within the operation of the statute of frauds, a written contract, though desirable, is not essential.

Express agreement is not necessary, neither is it essential that the parties shall have had a conscious intention to become partners. The relation may grow out of transactions and dealings in which the word "partnership" was never uttered; if the acts or contracts of the parties in law create partnership, that relation will ensue, even though the parties did not have that result consciously in mind, or though it was consciously in their intention to avoid partnership.[1]

§ 32. How affected by the statute of frauds.— Under the fourth section of the statute of frauds, an agreement to form a partnership in the future, which by its terms is not to be performed within one year, or an agreement for a present partnership to continue for more than a year from its commencement, is void if not in writing; though, in either case, if the parties have acted upon the agreement

[1] Jacobs v. Shorey (1868), 48 N. H. 100, 97 Am. Dec. 586.

and become partners, their relation will be treated as a partnership at will.[1]

With respect of partnerships in lands, there is some conflict as to the application of the statute. A few cases hold that such a partnership cannot be created without writing; but the great weight of modern authority is to the effect that writing is not required, and also that if a partnership is shown to exist it may be proved by parol evidence that its property consists of land.[2]

§ 33. Consideration for the contract.— The contract of partnership, like other agreements, requires to be founded upon some consideration in order to be binding.[3] Any contribution in the shape of capital or labor, or any act which may result in liability to third persons, is sufficient for the purpose.[4] The mutual covenants and contributions of the parties are the usual consideration. Their contributions need not, of course, be equal, for the members must be their own judges of the adequacy of the consideration. Neither is it necessary that the losses shall be shared equally or at all; for, as will be seen,[5] one partner may lawfully indemnify the other against loss by the enterprise.

§ 34. When the contract takes effect.— As has been already seen,[6] a mere intention to form a partnership does not create one; that intention must in some way be given legal operation. It is not, of course, essential that formal instruments shall be executed, and it may be found to have been the intention of the parties to launch the partnership at

[1] Wahl v. Barnum (1889), 116 N. Y. 87, 22 N. E. Rep. 280, 5 L. R. A. 623; Morris v. Peckham (1883), 51 Conn. 128, Paige's Partn. Cas. 114.

[2] See Bates v. Babcock (1892), 95 Cal. 479, 29 Am. St. Rep. 133, 16 L. R. A. 745; Chester v. Dickerson (1873), 54 N. Y. 1, 13 Am. Rep. 550; Richards v. Grinnell (1884), 63 Iowa, 44, 50 Am. Rep. 727; Holmes v. McCray (1875), 51 Ind. 358, 19 Am. Rep. 735; Flower v. Barnekoff (1890), 20 Ore. 132, 25 Pac. Rep. 370, 11 L. R. A. 149.

[3] See Mitchell v. O'Neale (1869), 4 Nev. 504, Paige's Partn. Cas. 6.

[4] 1 Lindley on Partnership (2d Am. ed., Ewell), 63.

[5] See *post*, § 51.

[6] See *ante*, §§ 13, 14.

once, notwithstanding the fact that regular partnership articles are afterwards to be prepared.[1]

Well-drawn partnership articles will name the day upon which the partnership is to begin; but in the absence of such a stipulation, or of any articles whatever, recourse must be had to other evidence. Presumptively in such cases the date of the commencement will be the day on which the agreement is fully and definitely consummated;[2] but the express stipulation of the parties, or the circumstances attending the case, may show either that the partnership is to have a retroactive operation, or that it is not to be deemed to be in force until some event has happened or some precedent condition has been complied with.[3] Conditions of the latter sort, however, may be waived, and will be held to be so where the partnership is actually launched before the contemplated time arrives.[4] So, also, where the arrangement contemplates action at once and continuously, a present partnership may exist, though some incidents remain to be determined later.[5]

§ 35. Question of the existence of a partnership one of mixed law and fact.— The question whether a partnership exists in a given case is one of mixed law and fact. What constitutes a partnership is a question of law; whether in the given case such facts exist as in law constitute a partnership is a question of fact if the facts are not admitted; if the facts are admitted, it is a question of law.[6] Whether a written instrument produced creates a partnership is a question of construction for the court.[7]

[1] See *ante*, § 14.

[2] See Guice v. Thornton (1884), 76 Ala. 466.

[3] See Reed v. Meagher (1890), 14 Colo. 335, 24 Pac. Rep. 681, 9 L. R. A. 455; National Bank v. Cringan (1895), — Va. —, 21 S. E. Rep. 820; Latta v. Kilbourn (1893), 150 U. S. 524, 37 L. Ed. 1169, 14 Sup. Ct. Rep. 201; Queen City Furniture Co. v. Crawford (1895), 127 Mo. 356, 30 S. W. Rep. 163.

[4] See First National Bank v. Cody (1893), 93 Ga. 127, 19 S. E. Rep. 831.

[5] See Kerrick v. Stevens (1884), 55 Mich. 167, 20 N. W. Rep. 888.

[6] Morgan v. Farrel (1889), 58 Conn. 413, 18 Am. St. Rep. 282.

[7] Boston Smelting Co. v. Smith (1880), 13 R. I. 27, 43 Am. Rep. 3

§ 36. Means of proof.— As between the alleged partners themselves, the existence of the partnership may be proved by the partnership articles, if any; if not, by informal writings, letters, the partnership books, the conduct and admissions of the parties, or by any other matters tending to prove the fact in controversy, and brought home to the party to be charged.[1]

As to third persons, the existence of the partnership and the persons who compose it may be proved by conduct, admissions or other kinds of parol evidence, even though there were partnership articles.[2]

The testimony of the parties themselves as to the facts is, under modern rules, admissible either to prove or disprove the alleged partnership.[3]

It may also be proved by the conduct or admissions of the parties sought to be charged;[4] but the acts or admissions of one person are not admissible to prove another to be a partner, unless the latter is in some way shown to be responsible for them or to have acquiesced in them.[5] The existence of the partnership or the persons composing it cannot be proved by general reputation, rumor or hearsay.[6]

[1] See Greenleaf on Evidence, vol. II, § 475 et seq.; Lindley on Partnership (Ewell's 2d Am. ed.), vol. I, p. 80 et seq.

[2] 1 Lindley on Partnership (Ewell's 2d Am. ed.), 87; 2 Greenleaf, § 479.

[3] First National Bank v. Conway (1886), 67 Wis. 210, 30 N. W. Rep. 215.

[4] Reed v. Cremer (1886), 111 Pa. St. 482, 56 Am. Rep. 295, where it is said that the partnership may be established by the several admissions of all those who were alleged to compose it, or by the admissions of one and the acts and declarations of the others. But the facts relied upon must be those which the party sought to be held caused or permitted to appear. Morgan v. Farrel (1890), 58 Conn. 413, 20 Atl. Rep. 614, 18 Am. St. Rep. 282.

[5] The declarations or admissions of one person that another is his partner are not admissible to prove that fact against the latter person, unless he has in some way authorized or assented to such declarations. Vanderhurst v. De Witt (1892), 95 Cal. 57, 30 Pac. Rep. 94, 20 L. R. A. 595; Dutton v. Woodman (1852), 9 Cush. (Mass.) 255, 57 Am. Dec. 46; Grafton Bank v. Moore (1842), 13 N. H. 99, 38 Am. Dec. 478.

[6] Brown v. Crandall (1835), 11 Conn. 92; Bowen v. Rutherford (1871), 60 Ill. 41, 14 Am. Rep. 25;

In seeking to establish partnership from acts and conduct, a wide range of evidence is allowed to put before the jury all the facts and circumstances relating to the connection of the alleged partner with the affair, and the method of transacting the business.

§ 37. **Burden of proof.**— The burden of proving the existence of the partnership and who were the partners composing it rests usually upon the party alleging it.[1] Where, however, its existence is shown or admitted, a presumption of its continuance ordinarily arises which casts upon the party alleging its termination the burden of showing that fact, including the giving of proper notice where that is necessary.[2]

Cook v. Slate Co. (1880), 36 Ohio St. 135, 38 Am. Rep. 568; Potter v. Greene (1858), 9 Gray (Mass.), 309, 69 Am. Dec. 290.

[1] See Lieb v. Craddock (1888), 87 Ky. 525, 9 S. W. Rep. 838; Dunham v. Loverock (1893), 158 Pa. St. 197, 38 Am. St. Rep. 838.

[2] See *post*, § 263.

CHAPTER V.

WHAT ACTS AND CONTRACTS CREATE A PARTNERSHIP.

§ 38. **How question arises.**— The question as to the existence of a partnership between given individuals may arise in two classes of cases:

1. Where the parties themselves allege that they intended partnership.

2. Where the parties or some of them allege that they did not intend partnership.

§ 39. **Partnerships inter sese and as to third persons.**— It is, in general, true that as between the parties to the al-

ıeged relation there can be no partnership if they did not intend one, and that as to third persons there can be no partnership if there was none as between the alleged partners themselves. Notwithstanding this general rule, it is equally true, as will be hereafter seen, that there are two apparent exceptions to it:

1. Persons may be held, notwithstanding a contrary intention, to have made a contract which in law constitutes them partners as between themselves; and

2. A person who is not actually a partner may be held liable to third persons as though he were a partner where he has so conducted himself as to reasonably induce such third persons to rely upon the assumption that he was a partner.

It will be obvious that these two cases are very different; in the first all the parties are held to be partners *as between themselves*, while in the second a person may be held liable *as* a partner when in fact, between him and the persons with whom he is thus assumed to be a partner, no intention to be partners existed. The first form, or the partnership *inter sese*, is therefore the only true partnership. This has led to a classification into, 1, true partnerships, and 2, *quasi*-partnerships.

I. Of True Partnerships.

§ 40. True partnerships, how classified.— It will be evident that true partnerships also may be divided into two classes: 1. Where a partnership was expressly intended; and 2. Where the parties did not expressly intend to become partners, but the law holds that the contract which they intentionally made does create a partnership between them, and which thus becomes, indirectly, an intentional partnership, because the law always presumes that parties intended the legal result of their intentional acts. These two classes will be separately considered.

§ 41. Of partnerships expressly intended.— Cases of this nature can ordinarily occasion but little difficulty. If it be

admitted that the parties intended to be partners, their intention can rarely fail of effect. Cases, however, are not infrequent in which the parties, intending to create a partnership and expressly naming their relation such, have still been held not to have created one because they had failed to attach to their relation the necessary incidents of partnership; as, for example, where their contract leaves them without any community of interest in the business or profits.[1]

It may also be that an instrument designed to constitute partnership articles is so defectively drawn as to create some other relation, as a co-ownership or a corporation; but unless some other distinct relation is thus expressly created, persons who have intended to be partners, and who have acted as such, will be deemed to be partners notwithstanding defective instruments.

§ 42. Of agreements held to create partnership inter sese when that was not intended. — The question whether a partnership has in fact been created between two or more persons, part or all of whom deny it, may arise in a great variety of cases. It is constantly arising as between the alleged partners and third persons who are seeking to hold them liable as such, and this phase of the question presents the most difficulty and gives rise to the greatest amount of litigation.

[1] Thus, in Sailors v. Nixon-Jones Co. (1886), 20 Ill. App. 509, Paige's Partn. Cas. 89, it is said: "The fact that the parties to such relation themselves call it a partnership will not make it so. Where the question of partnership is to be determined from a contract between the parties to it, the relation must be found from the terms and provisions of the contract, and even though parties intend to become partners, yet, if they so frame the terms and provisions of their contract as to leave them without any community of interest in the business or profits, they are not partners in fact or in law. Parsons on Partnership, 91. A partnership *inter se* must result from the intention of the parties as expressed in the contract, and they cannot be made to assume toward each other a relation which they have expressly contracted not to assume. The terms of the agreement, where there is one, fixes the real status of the parties toward each other."

The question, however, may and often does arise as between the alleged partners themselves. As between these parties, the question usually arises in one of two classes of cases: 1. Where an affair in which they have been in some way concerned has proven to be profitable, and one or more, alleging partnership, seek to compel an accounting, as partners, from the others, who deny it; and 2. Where such an enterprise has proved disastrous, and one or more alleging partnership seek to enforce contribution as partners from the others, who deny that any such relation existed. Other cases may, of course, arise where one or more claim other rights or powers as partners against the others, but the two classes of cases stated are the most common.

§ 43. Legal intention of parties controls.—Partnership, as has been seen, is the result of the express or implied agreement of the parties, and there can be no partnership — either as between the parties themselves or as to third persons — where the parties have not by their acts or contracts created one. When, therefore, the parties themselves, or some of them, deny that they intended to form a partnership, it becomes necessary to determine what is the legal effect of their acts and contracts. In dealing with this question, it must be borne in mind that it is the *legal* intention of the parties rather than their *expressed* or declared intention which controls. The law presumes that the parties intend the legal consequences of their voluntary acts and contracts. If, therefore, they intend the acts or contracts, they intend also, in contemplation of law, the legal effect of those acts and contracts.[1] Whether, then, the question arises

[1] Thus in Duryea v. Whitcomb (1858), 31 Vt. 393, Paige's Partn. Cas. 58, the court say: "If their contract was for a partnership by necessary legal construction (which we have found that it was), and they intended to make the contract (and this appears from the report), the legal effect of their contract could not be varied by their not supposing it to be what it was. The further statement in the report that they did not intend to form a partnership seems inconsistent with the other facts. . . . Probably the fair construction of the report is that the parties were not aware of the legal extent and

between the parties themselves, or between the parties and third persons, if the legal effect of their acts and contracts is the creation of a partnership, the parties will be deemed partners, notwithstanding their denial of an intention to become such. The law gathers their intention from their acts and contracts at the time, rather than from their contemporaneous or subsequent assertions. Greater effect may, however, be given to the expressed intentions of the parties when the question arises between themselves only, than where third persons are concerned. The latter cannot be presumed to know of the declared intention, and must therefore be left to judge by the legal intention which the outward acts and contracts of the parties manifest. In doubtful cases, too, of either sort, the expressed intention may be of consequence, and may even turn the scale in accordance with it.

§ 44. **Same subject.**— Keeping these distinctions in view, it is then true, as the rule is frequently declared, that whether a partnership has been created depends upon the real intention of the parties. If their agreement is in writing, its true construction must be ascertained. If it is not in writing, then the intention of the parties must be gathered from their words and conduct. What the parties have called themselves is not conclusive, for if they have stipulated for what is a partnership in fact, then even their express agreement that they should not be partners would not prevent the legal operation of their stipulations.[1] If, on the other

obligation of the contract into which they entered. As the contract imports a partnership, we must hold, in the absence of any express stipulation and of any other circumstances to show the contrary, that they intended to create the relation which the contract expresses." See, also, Chapman v. Hughes (1894), 104 Cal. 302.

[1] Thus in Beecher v. Bush (1881), 45 Mich. 188, 40 Am. Rep. 465, Paige's Partn. Cas. 46, after calling attention to the fact that in that case the parties manifestly had no purpose to become partners, it is said by Cooley, J.: "In general this should be conclusive. If parties intend no partnership the courts should give effect to their intent, unless somebody has been deceived by their acting or assuming to act as partners; and any such case must stand upon its peculiar facts

hand, their acts and contracts do not in law create a partnership, the fact that they have expressly called it such will not avail.[1]

§ 45. Tests of intention to form partnership.— While the intention of the parties is thus, in general, the controlling inquiry, there are a number of methods by which the courts have endeavored to ascertain what that intention was. Keeping in mind the definition that the partnership relation is based upon the agreement of the parties to unite their property, labor, capital or skill in carrying on business as principals for their joint profit, each being at the same time both principal of and agent for the other, several of the tests which are commonly applied to aid in determining when such an agreement exists may be noticed. Among these are —

§ 46. I. Agreements to share both profits and losses.— An agreement between two or more persons to unite their property, labor or capital to establish and carry on a business, in which business they are to have a community of interest — which they are to *own* in common, in which each is to be a principal owner or proprietor as distinguished from a mere agent, clerk or creditor — and the profits and losses of which they are to share because they *are* such owners, principals or proprietors, is the typical form of partnership. Such an agreement creates a partnership between the parties as a matter of law.

and upon special equities. It is, nevertheless, possible for parties to intend no partnership and yet to form one. If they agree upon an arrangement which is a partnership in fact, it is of no importance that they call it something else, or that they even expressly declare that they are not to be partners. The law must declare what is the legal import of their agreements, and names go for nothing when the substance of the arrangement shows them to be inapplicable. But every doubtful case must be solved in favor of their intent, otherwise we should carry the doctrine of constructive partnership so far as to render it a trap to the unwary. Kent, C. J., in Post v. Kimberly, 9 Johns. (N. Y.) 470, 504."

[1] Sailors v. Nixon-Jones Co., 20 Ill. Ap. 509, Paige's Partn. Cas. 89.

§ 47. Same subject.— Agreements, however, which present all of these characteristics occasion no difficulty, and the question of partnership is easily and certainly solved. The difficulty arises in those cases — which unfortunately but naturally constitute the great majority of those submitted to lawyers or courts for determination — in which *some* of these elements only are discernible, while others are not apparent at all or are to be extracted from a mass of more or less conflicting facts and circumstances. In such cases, the elements which *do* appear are not necessarily conclusive, and it is both unwise and dangerous to seize upon them as sufficient; they are *evidence* merely, and, as such, are more or less convincing according as they fit in with the remaining elements discovered.

Of this nature is the *mere* element of sharing profits and losses. It certainly furnishes strong evidence that the parties have united as principals for their joint profit, if any, and in the absence of anything to show that the profits and losses were to be shared on some other basis than that of principals in the business, it would usually be deemed conclusive. But it may still be shown that they were to share the profits and losses in some other capacity, and the evidence of partnership is thereby weakened if not dispelled. Where both parties contribute goods, or money to buy goods, for a common stock, in which they thus acquire a joint interest, then an agreement for a division of the profit and loss furnishes the strongest evidence of a partnership; and the same is true where each is to contribute services.

§ 48. Same subject.— The evidence is also strong where one furnishes money or property and the other furnishes services, though it is less strong in this case than in the others, because the parties have not necessarily a joint interest in the property, and the sharing in profits and loss may be but one means of compensating the second party for his services. Still less strong is the evidence where, though the parties are to share profits and losses in the sale of

goods, each one retains the individual title or control of his contribution.

To constitute a partnership, therefore, there must be added to the evidence of this one element of sharing profits and losses, the further evidence that the parties who so shared in such profits and losses were also principal proprietors in the business from which such profits or losses ensued, and that such sharing was because they stood in the relation of such principal proprietors and not in some other relation.[1]

§ 49. **II. Agreements to share profits, nothing being said about losses.**— It not infrequently happens that, while the element of profit sharing is clearly evident, the question of sharing losses appears to have been ignored. The failure or omission to provide for the losses may have been accidental or intentional. If it was accidental merely, it is ordinarily of little consequence, because the law will supply the omission if the other elements are present.[2] But if the omission was intentional, it challenges inquiry, though it may not be conclusive. Ordinarily one who shares the profits of the business because he is a principal therein, must, for the

[1] Spaulding v. Stubbings (1893), 86 Wis. 255, 56 N. W. Rep. 469, 39 Am. St. Rep. 888; Culley v. Edwards (1884), 44 Ark. 423, 51 Am. Rep. 614; Boston Smelting Co. v. Smith (1880), 13 R. I. 27, 43 Am. Rep. 3; Clifton v. Howard (1886), 89 Mo. 192, 58 Am. Rep. 97; Howze v. Patterson (1875), 53 Ala. 205, 25 Am. Rep. 607. In a recent case in Oregon (Flower v. Barnekoff (1890), 20 Ore. 137, 11 L. R. A. 149), it is said: "Partnership and community of interest independently considered are not always the same thing, nor is a mere community of interest sufficient; but there must be an agreement to share the profits and loss, and such profits must be shared as the result of the adventure or enterprise, in which both are interested, and not simply as a measure of compensation (Cogswell v. Wilson, 11 Ore. 372);" and "where it appears that there is community of interest in the capital stock, and also a community of interest in the profits and loss, there it is clear an actual partnership exists between the parties. Berthold v. Goldsmith, 24 How. (U. S.) 541."

[2] See Quinn v. Quinn (1889), 81 Cal. 14, 22 Pac. Rep. 264; Wipperman v. Stacy (1891), 80 Wis. 345, 50 N. W. Rep. 336.

same reason, share the losses also if loss results. But it is possible that one may share the profits of a business without being a proprietor therein. The facts must therefore be investigated further, and it must be ascertained why and in what relation the profits are to be received.

§ 50. **Same subject.**— Pursuing the investigation, if it be found that the parties have contributed to form a joint stock or capital of property or skill or labor, and have in the business a community of interest, then an agreement to share profits furnishes very strong evidence of partnership. But if one party only is to supply the stock or capital, the case is not so clear, though it is not conclusive. If, notwithstanding the fact that one is to furnish all the capital in the first instance, it still appears that the parties are to own the business in common, or are to have a common interest in or power of control over it, there is then the community of interest which ordinarily constitutes partnership;[1] but if there

[1] This distinction is very clearly illustrated in such cases as Magovern v. Robertson (1889), 116 N. Y. 61, 22 N. E. Rep. 398, 5 L. R. A. 589, where the parties held liable as partners had not only a right to share in the profits but had also, by the express terms of the contract, an interest in the stock and business to the extent of their loans and indorsements. "Persons," said the court, "having a proprietary interest in a business and in its profits are liable as partners to creditors." To like effect, because the alleged clerk was not only to have a share of the profits as compensation, but was also to have an interest in the stock and business itself: Sawyer v. First National Bank (1894), 114 N. C. 13, 18 S. E. Rep. 949; Hackett v. Stanley (1889), 115 N. Y. 625, 22 N. E. Rep. 745; and because the alleged loaner of money was also to have an interest in and control over the business: Spaulding v. Stubbings (1893), 86 Wis. 255, 56 N. W. Rep. 469, 39 Am. St. Rep. 888.

Care must therefore be taken to discriminate between the cases of alleged loans with a share of the profits by way of interest, and a real partnership disguised as a loan; for if it appears that the transaction is a mere device to obtain the advantages of a partnership without the responsibilities, it will be held to be a partnership whatever the parties may have called it. The test is usually to be found, according to the later cases, in the powers of control of the alleged lender. Has he any voice or part in controlling the management of the business as a principal therein? Has he, by

is to be no co-ownership of the business and one is to receive his share of the profits in some other capacity than as a principal proprietor, as, for example, if he is to receive it as compensation for his services, there is no partnership. Plainly, also, one who has a share of the profits in another's business by way of commission merely, or in lieu of salary, or as rent, or as interest on loans, is not a partner with the owner of that business.[1] To make them such, there must be here, as

virtue of the arrangement, such an interest in the business that he can be regarded both as principal and agent for the others? See Rosenfield v. Haight (1881), 53 Wis. 260, 40 Am. Rep. 770; Richardson v. Hughitt (1879), 76 N. Y. 55, 32 Am. Rep. 267; Leggett v. Hyde (1874), 58 N. Y. 272, 17 Am. Rep. 244; Hackett v. Stanley (1889), 115 N. Y. 625; and especially, Waverly Nat. Bank v. Hall (1892), 150 Pa. St. 466, 30 Am. St. Rep. 823, and Magovern v. Robertson (1889), 116 N. Y. 61, 5 L. R. A. 589. So care must be taken to discriminate between a real lease of premises and a partnership disguised under the form of a lease; for if the characteristics of a partnership are present, it will be held to be such regardless of what the parties may have called it. Webster v. Clark (1894), 34 Fla. 637, 16 So. Rep. 601, 43 Am. St. Rep. 217, 27 L. R. A. 126.

[1] See Sodiker v. Applegate (1884), 24 W. Va. 411, 49 Am. Rep. 252; Beecher v. Bush (1881), 45 Mich. 188, 40 Am. Rep. 465, Paige's Partn. Cas. 46; McDonnell v. Battle House Co. (1880), 67 Ala. 90, 42 Am. Rep. 99; Harvey v. Childs (1876), 28 Ohio St. 319, 22 Am. Rep. 387; Thayer v. Augustine (1884), 55 Mich. 187, 54 Am. Rep. 361; Morgan v. Farrel (1890), 58 Conn. 414, 20 Atl. Rep. 614, 18 Am. St. Rep. 282; Waverly Nat. Bank v. Hall (1892), 150 Pa. St. 466, 24 Atl. Rep. 665, 30 Am. St. Rep. 823; Boston Smelting Co. v. Smith (1880), 13 R. I. 27, 43 Am. Rep. 3; Parchen v. Anderson (1885), 5 Mont. 438, 51 Am. Rep. 65; Culley v. Edwards (1884), 44 Ark. 423, 51 Am. Rep. 614; Waggoner v. First Nat. Bank (1894), 43 Neb. 84, 61 N. W. Rep. 112. In respect of sharing profits by way of compensation for services, it was said in Sodiker v. Applegate (1884), 24 W. Va. 411, 49 Am. Rep. 252, *supra:* "In all cases there must be a participation as principals. If the persons merely occupy the relation of principal and agent, employer and employee or factor, no partnership can be predicated upon the fact that such agent, employee or factor receives a part or share of the profits for his service or other benefits conferred. This proposition is illustrated by numerous cases, among which are the following: Berthold v. Goldsmith, 24 How. (U. S.) 542; Burckle v. Eckhart, 1 Denio (N. Y.), 341; Bowyer v. Anderson, 2 Leigh (Va.), 550; Chapline v. Conant, 3 W. Va. 507, 100 Am. Dec. 766; Dils v. Bridge, 23 W. Va. 20; Hanna v. Flint, 14 Cal.

in the former case, a community of interest *in the business* itself as principals, each one being at once principal of and agent for the others.

§ 51. **III. Agreements to share profits with express stipulation against losses.**— Agreements are sometimes made by which, though all are to share in the profits, some of the parties are expressly to be protected against loss. Such an agreement may constitute a partnership if the other elements are present. It is lawful for the partners, as between themselves, to stipulate that one or more of them shall be indemnified against loss, though such a stipulation cannot affect the liability of the partners so indemnified to third persons.[1]

§ 52. **IV. Partnership in profits only.**— It is not indispensable that there shall be a common stock or fund of goods, land or other tangible property. The contributions of one or both of the partners may be simply skill or experience or capacity to labor. Even if tangible property is necessary to the transaction of the business, it is not essential that it shall be owned by all or any of the partners. It may be hired from a stranger, or one partner may supply its *use* to the firm, retaining the *title* in himself. It may be also that the contract contemplates a division only in case there are profits made, and that, if there are no profits, the expenses or losses are to be borne by one only or by both in their individual capacity. Each of these cases, and others of like kind which are legally possible, contemplate co-ownership only in the results of the enterprise rather than in the enterprise itself or the means of conducting it, and they are frequently spoken of as partnerships in the profits only.

73; Morgan v. Stearns, 41 Vt. 397." See, also, Buzard v. Bank of Greenville (1886), 67 Tex. 83, 60 Am. Rep. 7.

[1] See Brown v. Tapscott (1840), 6 Mees. & Welsby, 119, Ames' Partn. Cas. 468; Pollard v. Stanton (1845), 7 Ala. 761; Consolidated Bank v. State (1850), 5 La. Ann. 44; Baxter v. Hart (1894), 104 Cal. 344, 37 Pac. Rep. 941; Robbins v. Laswell (1862), 27 Ill. 365, Paige's Partn. Cas. 79.

Such a partnership differs from others in degree only and not in kind. To the extent of the community of interest — whether it be in profits only or more — there is a partnership with its incident rights and liabilities.[1]

§ 53. V. **Agreements to share gross returns.**— Persons who contribute property or funds for a common enterprise and agree to share the gross returns of that enterprise in proportion to their contributions, but who severally retain the title to their respective contributions, are not thereby rendered partners. They have no common stock or capital, and no community of interest as principal proprietors in the business itself from which the proceeds are derived.

Thus, co-owners who divide the earnings of a chattel are not partners; nor are sailors who divide the products of a voyage; or persons farming land on shares; or two or more coach-owners who pay their own expenses but divide the gross receipts of their respective lines of coaches in proportion to the respective earnings of each line; or two or more railroad companies who unite to form a continuous line of carriage, each paying its own expenses but dividing the receipts in proportion to the length of their respective lines; or the lessee and the manager of a theater who share the gross receipts; or workmen who build a chattel in common and divide the receipts; or persons one of whom furnishes a mill or a brick-yard and the other supplies the labor and materials to operate it and who divide the product; or persons who unite to buy land or chattels to be sold and the profits divided; or persons one of whom furnishes a plant or outfit while the other runs it, the profits being divided. Neither is a person a partner who leases property for a share in the gross receipts, as where one lets a hotel or a vessel or machinery, receiving a share of the returns as rent.[2]

[1] See Robbins v. Laswell (1862), 27 Ill. 365, Paige's Partn. Cas. 79; Stevens v. Faucet (1860), 24 Ill. 483, Paige's Partn. Cas. 64; Voorhees v. Jones (1861), 29 N. J. L. 270, Paige's Partn. Cas. 70.

[2] See French v. Styring (1857), 2 Com. B. (N. S.) 357, Ames' Cases on

§ 54. VI. Agreements to share losses only.— An agreement to share losses or expenses only does not usually constitute a partnership. Thus, an agreement between two railroad companies that any injury to persons or goods on the line of either shall be borne by the company on whose road it occurs, and that when the place of injury cannot be determined the loss shall be borne by both in the proportions in which they share the through rates for carriage, does not make the companies partners.[1]

II. Of Quasi-Partnerships.

§ 55. Of partnerships as to third persons.— Whenever there is a partnership as between the parties,— and this, as

Partn. 41 (dividing the earnings of a race-horse); Mair v. Glennie (1815), 4 Maule & Sel. 240 (sailors); Champion v. Bostwick (1837), 18 Wend. (N. Y.) 175, 31 Am. Dec. 376; Eastman v. Clark (1873), 53 N. H. 276, 16 Am. Rep. 192 (coach-owners); Irvin v. Railroad Co. (1879), 92 Ill. 103, 34 Am. Rep. 116 (railroad companies); Lyon v. Knowles (1863), 3 Best & Sm. 556 (theater); Hawkins v. McIntyre (1873), 45 Vt. 496 (workmen); Nelms v. McGraw (1890), 93 Ala. 245, 9 So. Rep. 719; Robinson v. Bullock (1877), 58 Ala. 618 (mill); Lamont v. Fullam (1882), 133 Mass. 583 (brick-yard); Bruce v. Hastings (1868), 41 Vt. 380; Munson v. Sears (1861), 12 Iowa, 172 (land cases). But there may be a partnership in buying land to sell again. See Flower v. Barnekoff (1890), 20 Ore. 187, 11 L. R. A. 149; Bates v. Babcock (1892), 95 Cal. 479, 29 Am. St. Rep. 133. Goell v. Morse (1879), 126 Mass. 480 (chattel to be resold); Quackenbush v. Sawyer (1880), 54 Cal. 439 (circus run by one and income divided); Beecher v. Bush (1881), 45 Mich. 188, 40 Am. Rep. 465; O'Donnell v. Battle House Co. (1880), 67 Ala. 90, 42 Am. Rep. 99; Miles Co. v. Gordon (1894), 8 Wash. 442, 36 Pac. Rep. 265 (hotel cases); Cutler v. Winsor (1828), 6 Pick. (Mass.) 335, 17 Am. Dec. 385 (vessel); Day v. Stevens (1883), 88 N. C. 83, 43 Am. Rep. 732; Putnam v. Wise (1841), 1 Hill (N. Y.), 234, 37 Am. Dec. 309; Donnell v. Harshe (1877), 67 Mo. 170; Reynolds v. Pool (1881), 84 N. C. 37, 37 Am. Rep. 607; Blue v. Leathers (1853), 15 Ill. 32, Paige's Partn. Cas. 87 (farming on shares): Hagenbeck v. Arena Co. (1893), 59 Fed. Rep. 14; Pulliam v. Schimpf (1893), 100 Ala. 362, 14 So. Rep. 488 (land-owner who furnishes site, and show or shooting-gallery proprietor who furnishes means of amusement, and divide proceeds).

[1] See Aigen v. Railroad Co. (1882), 132 Mass. 423; Irvin v. Railroad Co. (1879), 92 Ill. 103, 34 Am. Rep. 116.

has been seen, is the only true partnership,— there is also necessarily a partnership as to third persons, with its incidental rights and liabilities.

It is, however, entirely settled that a given individual may be made subject to the liabilities of a partner when in fact, as between himself and the persons with whom he was supposed to be a partner, no partnership existed or was intended. This presumed relation is sometimes spoken of as a partnership as to third persons to distinguish it from the partnership between the parties; but it is strictly not a partnership at all, for it does not follow because one person is held liable to another as a partner that the same conclusion involves a finding that, as between himself and his alleged partners, a partnership existed with its consequent rights and obligations.

Two main grounds of liability as a partner to third persons have been insisted upon and require consideration. One was that of sharing profits, and the other that of holding oneself out as a partner.

1. *Of Sharing Profits.*

§ 56. Sharing profits was formerly a ground of liability to third persons as a partner.— It was laid down at an early period in England, in two cases, Grace v. Smith,[1] and Waugh v. Carver,[2] which have since become famous in the law of partnership, that all persons who shared the profits of a business were liable as partners therein, although as between themselves no partnership existed or was contemplated.

The rule and the reason given for it are well illustrated in the second of these cases. It appeared that one Carver and his son, who were established in business at Gosport, had entered into an agreement with one Giesler, who was to establish himself in the same line of business at Cowes, by

[1] Grace v. Smith (1775), 2 Wm. Blackstone, 998, Ames' Partn. Cas. 1, Paige's Partn. Cas. 36.

[2] Waugh v. Carver (1793), 2 H. Blackstone, 235, 2 Smith's Lead. Cas. 1816, Ames' Partn. Cas. 6.

which the concerns were to co-operate in transacting business. It was expressly stipulated that neither concern was to be liable for the losses of the other, and that each was to be separate and distinct from the other, but once in each year the parties were to get together and divide in certain proportions the proceeds of the business of both concerns. Giesler incurred indebtedness in his own name, for which it was sought to make the Carvers responsible as partners. Lord Chief Justice Eyre, who delivered the opinion of the court, admitted that it was "plain upon the construction of the agreement, if it be construed only between the Carvers and Giesler, that they were not, nor even meant to be, partners." "They meant each house to carry on trade without risk of each other, and to be at their own loss. Though there was a certain degree of control at one house, it was without an idea that either was to be involved in the consequences of the failure of the other, and without understanding themselves responsible for any circumstances that might happen to the loss of either. That was the agreement between themselves. But the question is whether they have not, by parts of their agreement, constituted themselves partners in respect to other persons. The case, therefore, is reduced to the single point, whether the Carvers did not entitle themselves and did not mean to take a moiety of the profits of Giesler's house, generally and indefinitely as they should arise, at certain times agreed upon for the settlement of their accounts. That they have so done is clear upon the face of the agreement; and upon the authority of Grace v. Smith,[1] he who takes a moiety of all the profits indefinitely

[1] In Grace v. Smith, the facts were that Grace had sued Smith alone as a secret partner with one Robinson, for goods delivered to the latter, who became bankrupt in 1770. It appeared that on March 30, 1767, Smith and Robinson had formed a partnership for seven years, but in the following November it was dissolved and due notice was given. On the dissolution it was agreed that all the stock in trade and debts due the firm should be transferred to Robinson; that Smith was to have back £4,200 which he brought into the business, and £1,000 for profits up to that time; that Smith was to per-

shall, by operation of law, be made liable to losses, if losses arise, upon the principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts. That was the foundation of the decision in Grace v. Smith, and I think it stands upon the fair ground of reason." The Carvers were therefore held liable.

§ 57. **Same subject.**— It does not seem to have occurred to the court that the profits are *not* the fund, that is, the only or chief fund to which the creditors may resort, be-

mit £4,000 to remain as a loan to Robinson for seven years at five per cent. and an annuity of £300 per annum, for all which Robinson gave bond to Smith. Smith afterwards made further advances until the whole indebtedness amounted to £7,000, for which a new bond was given. The plaintiff contended that this arrangement made Smith a secret partner, but he was held not to be so liable. Said De Grey, C. J.: "The only question is, What constitutes a secret partner? Every man who has a share of the profits of a trade ought also to bear his share of the loss. And if any one takes part of the profit he takes a part of that fund on which the creditor of the trader relies for his payment. If any one advances or lends money to a trader it is only lent on his general personal security. It is no specific lien upon the profits of the trade, and yet the lender is generally interested in those profits; he relies on them for repayment. And there is no difference whether that money be lent *de novo* or left behind in trade by one of the partners who retires. And whether the terms of that loan be kind or harsh makes also no manner of difference. I think the true criterion is to inquire whether Smith agreed to share the profits of the trade with Robinson, or whether he only relied on those profits as a fund of payment; a distinction not more nice than usually occurs in questions of trade or usury. The jury have said that this is not payable out of the profits, and I think there is no foundation for granting a new trial." Gould, J., of same opinion. Blackstone, J.: "Same opinion. I think the true criterion (when money is advanced to a trader) is to consider whether the profit or premium is certain and defined, or casual, indefinite, and depending on the accidents of trade. In the former case it is a loan (whether usurious or not is not material to the present question), in the latter a partnership. The hazard of loss and profit is not equal and reciprocal, if the lender can receive only a limited sum for the profits of his loan, and yet is made liable to all the losses, all the debts contracted in the trade, to any amount." Nares, J., of same opinion.

cause, as will be seen, whether there are profits or not, the creditors may resort to *all* of the assets of the firm for payment, as well as to the individual responsibility of the partners. Neither was it observed that the very statement of the rule involved an inconsistency. Profits are what is left *after* the creditors are paid and not *before;* and therefore to take account of profits as such while the creditors yet remain unpaid was an inconsistency. Neither was it observed that the rule often resulted in compelling one creditor, though for a small amount, to stand liable as a partner to the other creditors, even in an indefinite amount. Whatever were the inconsistencies, however, as they have often since been pointed out, this was declared to be the rule, and it remained the rule in England for many years, and was adopted from thence into the United States, and has been reiterated and affirmed in many American cases.[1]

Under this rule it mattered little what was the name or nature of the arrangement under which the parties were related, or however strongly they asserted their intention not to be partners, or to what devices they had recourse to avoid such a conclusion; if they shared profits *as profits*, as the expression was, they were declared to be partners as to third persons and liable as such.

§ 58. Of the case of Cox v. Hickman.— In 1860 a case arose in the English courts which required a re-examination of the ground of liability by sharing profits. This was the case of Cox v. Hickman,[2] decided in the English House of Lords. The parties sought to be charged as partners were not partners *inter sese* and never intended to be, but they

[1] See Dob v. Halsey (1819), 16 Johns. (N. Y.) 34, 8 Am. Dec. 293; Bromley v. Elliot (1859), 38 N. H. 287, 75 Am. Dec. 182; Miller v. Hughes (1818), 1 A. K. Marsh. (Ky.) 181, 10 Am. Dec. 719; Simpson v. Feltz (1826), 1 McCord Ch. (S. C.) 213, 16 Am. Dec. 602; Sheridan v. Medara (1855), 2 Stockt. Ch. (N. J.) 469, 64 Am. Dec. 464; Pratt v. Langdon (1867), 97 Mass. 97, 93 Am. Dec. 61.

[2] Cox v. Hickman (1860), 8 House of Lords Cases, 268, Ames' Cases on Partn. 47.

were entitled to share in the net income of a business as creditors until their claims were paid.

The facts were that the firm of Smith & Son, becoming financially embarrassed, turned their property over to trustees appointed by their creditors. The trustees were to carry on the business under the name of "The Stanton Iron Company," and divide the net income, *which was always to be considered the property of Smith & Son*, among the creditors until their claims were paid, and then the property was to be restored to Smith & Son. Hickman sold goods to the trustees in the name adopted by them for the business, and drew bills on them which were accepted in that name by one of the managing trustees. These bills not being paid, the action was brought to charge the creditors as partners.

It was urged that as they were to share the profits they thereby became liable as partners, and many of the judges were of this opinion; but the Lords united in repudiating the old and arbitrary rule, and placed the liability upon the ground which has since been maintained in England — that of mutual agency.

§ 59. **Same subject.**— In the leading opinion of Lord Cranworth it was said: "It was argued that as they would be interested in the profits, therefore they would be partners. But this is a fallacy. It is often said that the test, or one of the tests, whether a person not ostensibly a partner is nevertheless in contemplation of law a partner, is whether he is entitled to participate in the profits. This no doubt is in general a sufficiently accurate test; for a right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim. But the real ground of the liability is that the trade had been carried on by persons acting on his behalf. When that is the case, he is liable to the trade obligations, and entitled to its profits, or to a share of them. It is not strictly correct to say that his right to share in the profits makes

him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on on his behalf, *i. e.*, that he stood in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made."

§ **60. Same subject.**—"Taking this to be the ground of liability as a partner," continued Lord Cranworth, "it seems to me to follow that the mere concurrence of creditors in an arrangement under which they permit their debtor, or trustees for their debtor, to continue his trade, applying the profits in discharge of their demands, does not make them partners with their debtor or the trustees. The debtor is still the person solely interested in the profits, save only that he has mortgaged them to his creditors. He receives the benefit of the profits as they accrue, though he has precluded himself from applying them to any other purpose than the discharge of his debts. The trade is not carried on by or on account of the creditors, though their consent is necessary in such a case, for without it all the property might be seized by them in execution. But the trade still remains the trade of the debtor or his trustees; the debtor or the trustees are the persons by or on behalf of whom it is carried on." The defendants were therefore held not liable.

§ **61. Effect of Cox v. Hickman on English law.**— In a case arising not long afterwards it became essential to determine, in the language of Blackburn, J., "what really was the effect of the decision of the House of Lords in Cox v. Hickman," and he said: "Prior to that decision, the *dictum* of De Grey, C. J., in Grace v. Smith, 'that every man who has a share of the profits of a trade ought also to bear a share of the loss,' had been adopted as the ground of judgment in Waugh v. Carver, where it was laid down 'that he who takes a moiety of all profits indefinitely shall, by op-

eration of law, be made liable to losses if losses arise, upon the principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts.' This decision has never been overruled. The reasoning on which it proceeds seems to have been generally acquiesced in at the time; and when, more recently, it was disputed, it was a common opinion (in which I for one participated) that the doctrine had become so inveterately part of the law of England that it would require legislation to reverse it. In Cox v. Hickman the creditors of a trade had agreed that their debtor's trade should be carried on for the purpose of paying them their debts out of the profits, and the composition deed to which they were parties secured to them a property in the profits. The rule laid down in Waugh v. Carver, if logically followed out, led to the conclusion that all the creditors who assented to this deed, and by so doing agreed to take the profits, were individually liable as partners; but when it was sought to apply the rule to such an extreme case, it was questioned whether the rule itself was really established. There was a very great difference of opinion amongst the judges who decided the case in its various stages below, and also amongst those consulted in the House of Lords. In the result, the House of Lords — consisting of Lord Campbell, C., and Lords Brougham, Cranworth, Wensleydale and Chelmsford — unanimously decided that the creditors were not partners. The judgments of Lord Cranworth and of Lord Wensleydale bear internal evidence of having been written. Lord Campbell, C., and Lords Brougham and Chelmsford said a few words expressing their concurrence. It is therefore in the written judgments, and more especially in the elaborate judgment of Lord Cranworth, that we must look for the *ratio decidendi*. . . .

"I think that the *ratio decidendi* is, that the proposition laid down in Waugh v. Carver — viz., that a participation in the profits of a business does of itself, by operation of law, constitute a partnership — is not a correct statement

of the law of England; but that the true question is, as stated by Lord Cranworth, whether the trade is carried on on behalf of the person sought to be charged as a partner, the participation in the profits being a most important element in determining that question, but not being in itself decisive; the test being, in the language of Lord Wensleydale, whether it is such a participation of profits as to constitute the relation of principal and agent between the person taking the profits and those actually carrying on the business."[1]

§ 62. Effect of Cox v. Hickman in the United States.—In the United States the case of Cox v. Hickman has been quite generally followed. In many of the states earlier decisions following the old English cases have been overruled, though in others, and notably in New York[2] and Pennsylvania,[3] the courts have held the former rule to be too deeply rooted in their jurisprudence to be overthrown, except by legislative action.

§ 63. Same subject — Beecher v. Bush.—In a case in Michigan[4] in which the question arose, the court, speaking through Mr. Justice Cooley, after reviewing many of the de-

[1] Bullen v. Sharp (1865), L. R. 1 Com. Pl. 86, Ames' Cas. on Partn. 67. See, also, Mollwo v. Courts of Wards (1872), L. R. 4 Pr. Coun. App. 419, Ames' Cases on Partn. 79; Pooley v. Driver (1876), 5 Ch. Div. 458, Ames' Cases on Partn. 87. See, also, now the Partnership Act, § 2, Appendix, *post.*

[2] See Leggett v. Hyde (1874), 58 N. Y. 272, 17 Am. Rep. 244; Hackett v. Stanley (1889), 115 N. Y. 625.

[3] See Wessels v. Weiss (1895), 166 Pa. St. 490, 31 Atl. Rep. 247. In North Carolina, see Southern Fertilizer Co. v. Reams (1890), 105 N. C. 283; Cossack v. Burgwyn (1893), 112 N. C. 304, 16 S. E. Rep. 900.

[4] Beecher v. Bush (1881), 45 Mich. 188, 40 Am. Rep. 465, Paige's Partn. Cas. 46. In this case it appeared that Beecher owned a hotel. One Williams proposed to "hire the use" of it and pay Beecher therefor, from day to day, a sum "equal to one-third of the gross receipts and gross earnings." Beecher accepted and the arrangement went into effect. Williams bought goods of Bush which he did not pay for, and this action was to hold Beecher liable for them as a partner with Williams by force of the arrangement. Held, not liable.

cisions both prior and subsequent to Cox v. Hickman, says: "It is needless to cite other cases. They cannot all be reconciled, but enough are cited to show that, in so far as the notion ever took hold of the judicial mind that the question of partnership or no partnership was to be settled by arbitrary tests, it was erroneous and mischievous, and the proper corrective has been applied. Except when one allows the public or individual dealers to be deceived by the appearances of partnership where none exists, he is never to be charged as a partner, unless by contract and with intent he has formed a relation in which the elements of partnership are to be found. And what are these? At the very least the following: Community of interest in some lawful commerce or business, for the conduct of which the parties are mutually principals of and agents for each other, with general powers within the scope of the business, which powers, however, by agreement between the parties themselves, may be restricted at option, to the extent even of making one the sole agent of the others and of the business."

§ 64. Same subject — Harvey v. Childs. — In another case[1] upon the subject which arose in Ohio it is said: "What shall be regarded, as to third persons, as a test of partnership between parties who did not consider themselves to be part-

[1] Harvey v. Childs (1876), 28 Ohio St. 319, 22 Am. Rep. 387. In this case one Potter was buying hogs for shipment. He had not money enough, and tried to get Childs to supply it and take an interest in the venture, but Childs refused. It was then agreed that Childs should let Potter have money to complete his purchases, and Childs was to take possession of the hogs as security, sell them, reimburse himself and have half of the net profits; but that in any event Potter should pay back all of Childs' advances. Without the knowledge of Childs, Potter bought on his own credit a lot of hogs of Harvey, the plaintiff, but did not pay for them. These hogs formed part of the lot which Childs sold in pursuance of his arrangement with Potter. There were no profits, but a loss, and Potter made it good to Childs. Potter did not pay Harvey, and Harvey sued Childs to hold him liable as a partner with Potter in the purchase. *Held*, that he was not liable. See, also, Clifton v. Howard (1886), 89 Mo. 192, 58 Am. Rep. 97.

ners and who have done nothing to estop them from denying that they are such, has been much discussed by courts and elementary writers, and the problem seems to be one of difficult solution. It is needless to review here the numerous cases on the subject; a statement of results is sufficient.

"No little difficulty has been experienced in determining the meaning and limits of phrases that have been recognized as tests of a partnership in such cases, and in their application to the varying cases that arise. The effort has been to draw a distinct line between cases where one has a community of interest in the profits of a business, as distinguished from those where one is entitled to receive a sum of money out of the profits as a creditor, or a sum proportioned to a *quantum* of profits, or a share of the profits as a compensation for services or labor.

"Although a partnership may be said to rest upon the idea of a communion of profits, nevertheless the foundation of the liability of one partner for the acts of another is the relation they sustain to each other, as being each principal and agent. That relation, it would seem, then, constitutes the true test of a partnership liability, and rests upon the just foundation that the joint liability was incurred on the express or implied authority of the party sought to be charged."

§ 65. **Same subject.** — "But if the relation of principal and agent be regarded as the test of a partnership and consequent joint liability," continued the court, "the question still remains: What shall be deemed sufficient evidence of that relation, or to raise the implication of authority to incur the liability in question? To this end numerous tests have been supposed to exist; but the best considered and least objectionable is that of a community of interest in the profits of a business or transaction as a principal or proprietor. But this test is valuable as a rule chiefly because it evinces a relation between the parties, where each may

reasonably be presumed to act for himself and as agent for the others, and to that extent establishes the fact that the liability was incurred on the authority of all so participating in the profits. Participation in the profits of a business, however, cannot be regarded as a rule so universal and unrelenting as to be unjustly applied to a case where a debt is incurred by one who cannot be said to be acting, in the particular transaction, as the agent or on behalf of the party sought to be charged. Therefore, on principle, the true test of a partnership, at last, is left to be that of the relation of the parties as principal and agent, to be proved by any competent evidence; for where they sustained that relation, a joint liability may be said to have been incurred by the authority or on behalf of each of the parties so related. The tendency of the more modern authorities, both English and American, is to this conclusion."

§ 66. **Same subject — Meehan v. Valentine.**— The test of mutual agency has not, however, proven entirely satisfactory to all of the courts. It is said, and not without reason, that this is to invert the logical order of events and turn the result into the cause — that mutual agency is the result of partnership rather than that partnership is the result of mutual agency. Thus it is said in a recent case[1] in the supreme court of the United States: "As has been pointed out in later English cases, the reference to agency

[1] Meehan v. Valentine (1891), 145 U. S. 611. This was an action brought to charge the estate of one P., deceased, of which V. was executor, on the ground that P. was a partner in the firm of C. & Co. P. loaned C. & Co. $10,000 on the agreement that he was to have, in addition to the interest, one-tenth of the net profits over a given sum. P. received, under this agreement, about $1,500 the first year; but afterwards, as it was difficult to determine the exact profit, it was agreed that he should have $1,000 each year on account, leaving the exact amount to be determined on the final settlement of the whole business. This arrangement was continued for four years, when C. & Co. failed, owing large amounts to the plaintiff and others. The court held that this was a loan; that P. was a creditor and not a partner, and consequently that the action could not be maintained.

purposes, it is that principle of the law which operates to prevent a man, who has knowingly led another reasonably and in good faith to rely upon the existence of a certain condition of things, from afterwards denying, to the prejudice of such other, that such a condition of things did exist. In the law of partnership it is commonly spoken of as a liability incurred by holding oneself out as a partner.

§ 70. Same subject — What facts must exist? — In order to the existence of this liability, two main facts must exist:

1. The condition or thing relied upon as evidence of the holding out must have been caused either by the party to be charged as partner, in person, or by another with his knowledge and consent; and

2. The party seeking to hold him liable as a partner must, in the exercise of reasonable prudence and good faith, have relied upon such condition or thing and been misled by it.[1]

The condition or thing relied upon may be an act or a representation or a mere failure to act. No particular form or ceremony is necessary. The appearance or condition relied upon need not have been caused by the party in person, but may have been caused by others with his knowledge

[1] In Lindley on Partnership (vol. 1, p. 48) it is said: "It follows . . that a person cannot be liable on a contract, on the ground that he held himself out as a partner, unless he did so before the contract was entered into. It also follows that no person can be fixed with liability on the ground that he has been held out as a partner, unless two things concur, viz.: first, the alleged act of holding out must have been done either by him or by his consent, and secondly, it must have been known to the person seeking to avail himself of it. In the absence of the first of these requisites, whatever may have been done cannot be imputed to the person sought to be made liable; and in the absence of the second, the person seeking to make him liable has not in any way been misled." See, also, Hahlo v. Mayer (1890), 102 Mo. 93, 22 Am. St. Rep. 753; Fletcher v. Pullen (1889), 70 Md. 205, 14 Am. St. Rep. 355; Morgan v. Farrel (1890), 58 Conn. 413, 18 Am. St. Rep. 282; Van Kleeck v. Hammell (1891), 87 Mich. 599, 24 Am. St. Rep. 182; Thompson v. First National Bank (1883), 111 U. S. 529; Lincoln v. Craig (1889), 16 R. I. 564, 18 Atl. Rep. 175; Cornhauser v. Roberts (1890), 75 Wis. 554, 44 N. W. Rep. 744.

and consent. It may consist in a mere omission to do what a reasonable man should do, under the circumstances, to prevent third persons from being misled by a false appearance of things of which he had notice.[1]

§ 71. Same subject — Who may enforce liability.— It is not necessary that the condition or appearance shall have been known to persons generally; it is enough, but also essential, that it was known to the party deceived by it.[2] But the party seeking to enforce the liability must have exercised reasonable prudence, must have acted in good faith, and must have been actually deceived by the condition or appearance. If he knew, or might have known, the true state of facts, or if he did not rely upon the appearance or condition, he has no cause of complaint.[3]

[1] Thus in Fletcher v. Pullen, *supra*, there was evidence that the defendant, to his knowledge, had been advertised in the newspapers as a partner with another person. Said the court: "Having knowledge of these advertisements, it was his duty to deny the partnership if he wished to escape liability. But what was he to do and how much? We do not say that he was under a legal obligation to publish a repudiation of the partnership in the same newspapers, or in any other, though this would seem to be a very obvious and the most efficient mode of proclaiming such denial, and the fact that he failed to do so was a circumstance to go to the jury. But we take it that the rule upon this subject stated by a very eminent jurist is reasonable and just: 'If one is held out as a partner, and he knows it, he is chargeable as one, unless he does all that a reasonable and honest man should do, under similar circumstances, to assert and manifest his refusal, and thereby prevent innocent parties from being misled.' Parsons on Partnership, 134."

[2] Clearly the party cannot be held liable as a partner by estoppel except to those who knew of the holding out and relied upon it. Webster v. Clark (1894), 34 Fla. 637, 16 So. Rep. 601, 43 Am. St. Rep. 217, 27 L. R. A. 126; Dubos v. Jones (1894), 34 Fla. 539, 16 So. Rep. 392; Knard v. Hill (1893), 102 Ala. 570, 15 So. Rep. 345.

[3] In Morgan v. Farrel, *supra*, the court held that the party seeking to enforce the liability must show that he exercised good faith and due diligence to know the truth; and that if such circumstances are brought to his notice as would be certain to excite inquiry in the mind of any prudent man, and the means of ascertaining the truth were readily accessible but not used, the party could not recover.

In a recent case[1] it is said: "The law on this subject, well established by authority, may be stated thus: The ground of liability of a person as partner who is not so in fact is that he has held himself out to the world as such, or has permitted others to do so, and by reason thereof is estopped from denying that he is one as against those who have in good faith dealt with the firm or with him as a member of it. But it must appear that the person dealing with the firm believed, and had a reasonable right to believe, that the party he seeks to hold as a partner was a member of the firm, and that the credit was, to some extent, induced by this belief. It must also appear that the holding out was by the party sought to be charged, or by his authority, or with his knowledge or assent. This, where it is not the direct act of the party, may be inferred from circumstances, such as advertisements, shop bills, signs or cards, and from various other acts from which it is reasonable to infer that the holding out was with his authority, knowledge or assent."

§ 72. Same subject — Evidence admissible.— The burden of proving the liability as a partner is upon him who asserts it. This proof may be made by any kind of evidence having a legitimate tendency to that end. Thus it may be established not only by direct evidence, but by the admissions, acts or declarations of the party sought to be charged. It cannot, however, be established by showing a general reputation that the party was a partner.

Whether the party charged has held himself out as a partner, or has permitted it to be done, is a question of fact for the jury.[2]

§ 73. Same subject — The effect.— A person may thus become liable as though he were a partner by "holding out," either in contract or in tort; but he is not thereby made a

[1] Fletcher v. Pullen, *supra*.

[2] Fletcher v. Pullen (1889), 70 Md. 205, 16 Atl. Rep. 887, 14 Am. St. Rep. 355; Seabury v. Crowell (1890), 51 N. J. L. 108, 52 id. 413, 16 Atl. Rep. 84, 11 L. R. A. 136.

partner as to other persons than those relying upon the condition or appearance for which he is thus held responsible, nor does he acquire the rights or obligations of a partner as between himself and his alleged copartners.

Whether he is to be held liable alone or in connection with his reputed partner must depend upon the acts of both. If the person with whom he was held out as a partner was ignorant of it and did not concur in it, he could not be held liable. If, on the other hand, he concurred or co-operated in the holding out of the other, both may be held liable.

It must also be borne in mind that though a partnership actually exists with certain bounds or limits, one or more partners may become liable to third persons beyond those bounds or limits, if they hold themselves out as partners in a more enlarged capacity than that fixed as between the partners themselves.

CHAPTER VI.

OF SOME INCIDENTS OF PARTNERSHIP.

§ 74. **In general.**— A partnership having been formed, a number of subjects incident to its existence become important, and though they may not all be similar in their character they may appropriately be grouped together in one chapter for consideration.

I. Of Articles of Partnership.

§ 75. **Of the necessity of articles.**— As has been stated, it is desirable, but not usually indispensable, to have written evidence of the agreement between the parties as to the creation, continuance, terms and conditions of their partnership. The formal written instruments prepared in such cases are spoken of as the partnership articles. As between themselves, it is, in general, possible for the parties to fix their rights, duties and liabilities, as well as the circumstances of the commencement, continuance and termination of the partnership, by their agreement; and though, in the absence of such an agreement, the law will usually determine these matters for them, it is not by any means certain that the legal conclusions will be the same that the parties contemplated, and it is in any event desirable that the opportunity for controversy be removed by express stipulation.

§ 76. **Of the scope of articles.**— It is not, however, usually feasible, by even the most carefully-drawn articles, to provide beforehand for *every* possible contingency, or to define *all* the rights, duties or liabilities of the partners. Much must of necessity be understood; custom or usage may be tacitly recognized; and conduct or practice may add to or modify that which is expressed. It may thus happen that, in a given case, the body of law or rules which are to govern the relations of the partners as between themselves is to be gathered from a variety of sources. As was said in one case:[1] "The duties and obligations arising from the relation between the parties are regulated by the express contract

[1] Smith v. Jeyes, 4 Beavan (Eng. Ch.), 505.

between them so far as the express contract extends and continues in force; but if the express contract, or so much of it as continues in force, does not reach to all those duties and obligations, they are implied and enforced by the law; and it is often matter to be collected and inferred from the conduct and practice of the parties whether they have held themselves, or ought or ought not to be held, bound by the particular provisions contained in their express agreement."

In another case,[1] in which the question was whether the defendant was entitled to draw a salary in half years when there were no net profits, the court said: "This question is open to doubt if the partnership articles alone are looked at, but its determination does not depend merely upon the construction which would be given to the partnership articles, taken by themselves alone. It is a general rule for the construction of written instruments, including statutes, deeds and contracts, that when the language is open to doubt, and parties whose interests are diverse have from the outset adopted and acted upon a particular construction, such construction will be of great weight with the court, and will usually be adopted by it.[2] This rule has full force in the construction of partnership articles, and a practical construction given for several years by the partners themselves to language which would otherwise be open to doubt will usually be accepted by the court as conclusive."

§ 77. **Of the construction of articles.**— In endeavoring to determine what the parties intended by their express provisions, certain rules of construction have been laid down by the courts. Among these, the most important is that which gives prominence to the general purpose and object of the partnership. If certain of the provisions of the articles are capable of two constructions, one of which would promote

[1] Winchester v. Glazier (1890), 152 Mass. 316, 25 N. E. Rep. 728, 9 L. R. A. 424.

[2] Citing Stone v. Clark, 1 Metc. 378; Stevenson v. Erskine, 99 Mass. 367; Lovejoy v. Lovett, 124 Mass. 270, 274; Chicago v. Sheldon, 9 Wall. 50, 54.

while the other would retard or defeat that general purpose or object, the former construction is to be preferred; so if powers claimed would, by their exercise, advance the general object, their existence will be more readily inferred than if they are obstructive to it. In the same line are the other rules of construction, that powers conferred are to be deemed to have been so conferred with a view to the benefit of all concerned, and hence that an exercise of it for the benefit of one to the detriment of the others was not really intended, though the words used might, upon their face, bear such a construction; and that any provision, however worded, is, if possible, to be so construed as to prevent one partner from defrauding another in reliance upon its letter, but in violation of its spirit.[1]

§ 78. **Of waiving or enlarging express provisions by conduct.**— Any written stipulation, however express, is capable of being modified, superseded or abandoned by the consent of *all* of the partners; and this consent may be shown not only by express words, but by conduct or the established practice of the parties. But the unanimous consent of all is necessary, for a portion cannot alter, modify or enlarge the contract of all.

In an English case[2] it was said by Lord Eldon: "In ordi-

[1] See Blissett v. Daniel (1853), 10 Hare (Eng. Ch.), 493; Pettyt v. Janeson (1819), 6 Maddock (Eng. Ch.), 146.

[2] Const v. Harris (1824), 1 Tur. & Rus. 496. So in England v. Curling (1844), 8 Beavan, 129, it was said by Lord Langdale: "With respect to a partnership agreement, it is to be observed that, all parties being competent to act as they please, they may put an end to or vary it at any moment; a partnership agreement is therefore open to variation from day to day, and the terms of such variations may not only be evidenced by writing, but also by the conduct of the parties in relation to the agreement and to their mode of conducting their business: when, therefore, there is a variation and alteration of the terms of a partnership, it does not follow that there was not a binding agreement at first. Partners, if they please, may, in the course of the partnership, daily come to a new arrangement for the purpose of having some addition or alteration in the terms on which they carry on business, provided those additions or alterations be made

nary partnerships nothing is more clear than this: that, although partners enter into a written agreement, stating the terms upon which the joint concern is to be carried on, yet if there be a long course of dealing, or a course of dealing not long, but still so long as to demonstrate that they have all agreed to change the terms of the original written agreement, they may be held to have changed those terms by conduct. For instance, if in a common partnership the parties agree that no one of them shall draw or accept bills of exchange in his own name without the concurrence of the others, yet, if they afterwards slide into a habit of permitting one of them to draw or accept bills without the concurrence of the others, this court will hold that they have varied the terms of the original agreement in that respect."

§ 79. **Of continuing partnership under former articles.** When a partnership has existed under articles providing for a definite term, and upon the expiration of that term the partnership is continued without any new agreement, the original articles will continue to regulate the rights and obligations of the partners, though the continuing partnership will usually be deemed to be at will merely and not renewed for a similar term. The original articles may also survive changes in the persons comprising the firm, and be continued by their adoption by the new firm.[1]

§ 80. **Of the usual clauses in partnership articles.**— The subjects most commonly covered by the partnership articles are: (1) the nature, name and place of the business; (2) the commencement and duration of the partnership; (3) the capital and property of the firm; (4) the share of

with the unanimous concurrence of all the partners." See, also, Scudder v. Ames (1886), 89 Mo. 496; Gammon v. Huse (1881), 100 Ill. 234; Gage v. Parmlee (1877), 87 Ill. 329; Thrall v. Seward (1865), 37 Vt. 573; Gregg v. Hord (1889), 129 Ill. 613, 22 N. E. Rep. 528.

[1] See Metcalfe v. Bradshaw (1893), 145 Ill. 124, 33 N. E. Rep. 1116, 36 Am. St. Rep. 478; United States Bank v. Binney (1828), 5 Mason (U. S. C. C.), 176; Boardman v. Close (1876), 44 Iowa, 428; Sangston v. Hack (1879), 52 Md. 173.

each in the profits and losses; (5) the conduct and powers of the partners; and (6) the dissolution and winding up of the firm. Many other subjects are introduced in special cases. A form of articles which may prove to be suggestive is printed in an appendix.

§ 81. Of the enforcement of the provisions.— It is customary to include provisions for arbitration in case of disputes, and for fixing the value of shares by that method in case of the retirement of a partner. Provisions are also frequently inserted for making offers to buy or sell in case of dissolution; for giving indemnity against debts to the retiring partner; for taking in new partners; for permitting the representatives of a deceased partner to be admitted; for expelling a partner; and the like. Many of these provisions can have only a negative effect, for it is well settled that agreements to become partners, agreements to continue a partnership for a definite time, agreements to submit disputed matters to arbitration, and agreements to admit new partners, will not be specifically enforced by the courts, but the parties will be left to such remedy as they may find, if any, in an action for the breach of the agreement. The execution of formal instruments clearly provided for may be specifically enforced, including even the execution of partnership articles, where that is necessary to confer upon one party a right to which he is entitled, even though the partnership thereby created may be immediately dissolved.[1]

II. Of the Firm Name.

§ 82. Of the need of a firm name.— A firm name is a customary but not a necessary incident of a partnership. As has been seen, the partnership is not, in legal contempla-

[1] See England v. Curling (1844), 8 Beavan (Eng. Ch.), 129; Buck v. Smith (1874), 29 Mich. 166, 18 Am. Rep. 84; Somerby v. Buntin (1875), 118 Mass. 279, 19 Am. Rep. 459; Tobey v. Bristol County, 3 Story (U. S. C. Ct.), 819.

tion, a distinct and separate entity, but merely a collection of individuals with whom, for most purposes, the law deals as such. A firm name, therefore, is not indispensable,[1] but it is a matter of convenience in identifying and ascertaining the individuals interested; and when a firm name has been adopted, it ought always to be used in the partnership transactions.

§ 83. **What name may be adopted.**—In some states, as in New York, statutes have been enacted forbidding the use of the name of a person not actually interested in the firm, or the use of the term "& Co." unless it represents an actual partner.[2] But where no statute prevents, the firm may adopt any name it chooses, so long as it does not interfere with the rights of others. It may thus use the name of a stranger, of a single partner or of a portion of the partners, or it may adopt a wholly fictitious name. It may also acquire a name by usage, even though it has another fixed by the agreement of the partners. And though it may have a regular firm name, it may be bound by the use, in a single transaction, of some other name.[3] It may change or add to

[1] See Meriden Nat. Bank v. Galladet (1890), 120 N. Y. 298, 24 N. E. Rep. 994.

[2] As to the use of the term "& Co.," when forbidden by statute, see Gay v. Seibold (1884), 97 N. Y. 472, 49 Am. Rep. 533; Sparrow v. Kohn (1885), 109 Pa. St. 359, 58 Am. Rep. 726; Wood v. Railroad Co. (1878), 72 N. Y. 196, 28 Am. Rep. 125; Zimmerman v. Erhard (1880), 83 N. Y. 74, 38 Am. Rep. 396. Where no such statute exists, the use of "& Co." raises no necessary presumption that it represents a partner. Robinson v. Magarity, 28 Ill. 423; Brennan v. Pardridge, 67 Mich. 449. As to whether the firm name is such as to import a partnership or a corporation, see Birmingham Loan Co. v. First Nat. Bank (1893), 100 Ala. 249, 46 Am. St. Rep. 45; Clark v. Jones, 87 Ala. 474; Seymour v. Harrow Co., 81 Ala. 250.

[3] An obligation under seal executed by all the members of a firm, in and for its business and for its benefit, binds the firm although the firm name is not mentioned, and although it appears upon its face to be simply the obligation of the partners contracted in their individual names. Berkshire Woolen Co. v. Juillard (1879), 75 N. Y. 535, 31 Am. Rep. 489. A firm is bound by an acceptance in an agent's name which it has adopted as a firm name by an agreement of the

its name at any time. It may acquire rights in its firm name and transfer them in the individual names of the partners, and *vice versa*. Whatever the name used, it may be shown by parol evidence who the persons were who were represented by it.

§ 84. What may be done in the firm name.— As a general rule, all simple contracts, written or unwritten, negotiable or non-negotiable, whether creating rights or imposing obligations, may be made in the firm name,[1] and, as will be seen,[2] one partner has usually implied authority to bind the firm by contracts made in its name for partnership purposes. But one partner has no implied authority to bind the firm by an instrument under seal, and, in general, conveyances of real estate cannot be made either by or to the firm in the firm name. Such conveyances will, however, usually operate to convey an equitable interest which may be enforced in a court of chancery; and where a conveyance of real estate is made to a firm in the name of the firm which contains the full name of one or more of the partners, a legal title will generally be held to vest in those partners whose names appear, and equity will charge them as trustees for all.[3]

partners to do business under the name of such agent, where it does not appear that the agent was doing business also on his own account; but if that fact appears, it must be shown that he accepted the bill on account of the partnership in order to bind it. Bank of Rochester v. Monteath (1845), 1 Denio (N. Y.) 402, 43 Am. Dec. 681. See, also, Le Roy v. Johnson, 2 Peters (U. S.), 186; Ripley v. Colby (1851), 23 N. H. 438; Getchell v. Foster, 106 Mass. 42; Uhler v. Browning, 28 N. J. L. 79; Barcroft v. Haworth, 29 Iowa, 462.

[1] A chattel mortgage may be taken in the firm name. Hendren v. Wing (1895), 60 Ark. 561, 31 S. W. Rep. 149. As to real estate mortgage, see Woodward v. McAdam (1894), 101 Cal. 438.

[2] See *post*, § 164.

[3] A deed to John Smith & Co. operates to vest the entire legal title in John Smith alone. Winter v. Stock, 29 Cal. 407, 89 Am. Dec. 57; Moreau v. Saffarans, 3 Sneed (Tenn.), 595, 67 Am. Dec. 582. A mortgage of real estate given to "Farnham & Lovejoy, of the county of Hennepin, state of Minnesota," is legally sufficient as a mortgage to S. W. Farnham and

Unless authorized by statute, actions cannot be maintained either by or against the partnership in the firm name, but must be brought in the individual names of the partners.[1]

§ 85. Of the firm name as property.—"The name by which a firm is known," says Mr. Justice Lindley,[2] "is not of itself the property of the firm, and there is nothing at common law to prevent persons from carrying on business in partnership under any name they please." Notwithstanding this, however, it is clear that the firm name is a thing of value, which may be made the subject of sale or assignment. It is also a thing which the law will protect. Thus Mr. Lindley continues: "One firm is not at liberty to mislead the public by so using the name of another firm as to pass off themselves or their goods for that other or for the goods of that other. Moreover, an established firm can prevent a company (corporation) from registering under the name of the firm."

But the rule that one firm cannot adopt the same name as another firm is subject to the qualification that a person or a number of persons, who have not limited their right by contract, cannot be prevented from using his or their own name, even though it be that of a former firm in the same business,[3] provided it is done in good faith and with no attempt to mislead the public as to the identity.[4]

J. A. Lovejoy, shown to have been the members of a firm engaged in business in that county under that name. Menage v. Burke (1890), 43 Minn. 211, 19 Am. St. Rep. 235. See, also, Townshend v. Goodfellow (1889), 40 Minn. 312, 12 Am. St. Rep. 736; Kelley v. Bourne, 15 Ore. 476. To same effect in case of deed: Sherry v. Gilmore, 58 Wis. 324; Cole v. Mette, 65 Ark. 504.

[1] Thus, see Whitman v. Keith, 18 Ohio St. 134; Fitzgerald v. Grimmell, 64 Iowa, 261; Love v. Blair, 72 Ind. 281; Ladiga Saw Mill Co. v. Smith, 78 Ala. 108.

[2] Lindley on Partnership (Ewell's 2d Am. ed.), p. 114.

[3] See Williams v. Farrand (1891), 88 Mich. 473, 50 N. W. Rep. 446, 14 L. R. A. 161; Russia Cement Co. v. Le Page (1888), 147 Mass. 206, 17 N. E. Rep. 304, 9 Am. St. Rep. 685; Meneely v. Meneely (1875), 62 N. Y. 427, 20 Am. Rep. 489; Rogers v. Rogers (1885), 53 Conn. 121, 55 Am. Rep. 78.

[4] Where such an attempt appears,

§ 86. Of the right to the firm name upon dissolution.— The firm name, as has been seen, may be one of two kinds,— it may be a fictitious name, like "The Ann Arbor Hardware Co.," or it may be a purely personal one, made up of the individual names of the partners, like "Smith & Jones;" and some difference in legal consequences follows the distinction:

1. Upon the dissolution of the partnership by mere lapse of time or otherwise, neither partner buying out the other, either would have the right to go into business for himself and adopt the old firm name if it was a fictitious one and could be used without leading the public to believe that the old firm still continued; but neither would have the right to use the old firm name including the individual names of any partner who did not continue with him, nor to announce himself "*successor to*" the old firm, though either might designate himself as "*formerly of*" the old firm; but he must do nothing to deceive the public, as by putting his own name and the "formerly of" in very small letters, and the old firm name in very large letters.[1]

2. Upon the dissolution of a partnership by death, it has been held that the survivor has the right to continue the use of the old name, whether fictitious or personal;[2] but the true rule seems to be that the name, if of value, is a partnership asset, and must be dealt with as such.[3]

3. If one partner buys out the other for the purpose of continuing the business, but nothing is expressly agreed upon in reference to the name, the sale by one of all his interest in the business, and *a fortiori* if the good-will be expressly included, gives to the continuing partner the exclusive right to continue the use of the old firm name if it be a fictitious

the use may be enjoined. Bininger v. Clark (1870), 60 Barb. (N. Y.) 113.

[1] See Hookham v. Pottage (1872), L. R. 8 Ch. App. 91; Smith v. Cooper (1877), 5 Abb. New Cas. (N. Y.) 274; Morgan v. Schuyler (1880), 79 N. Y. 490, 35 Am. Rep. 543; Peterson v. Humphrey (1857), 4 Abb. Pr. (N. Y.) 394; Holbrook v. Nesbitt (1895), 163 Mass. 120, 39 N. E. Rep. 794.

[2] See Lewis v. Langdon, 7 Simons (Eng. Ch.), 421.

[3] See Fenn v. Bolles, 7 Abb. Pr. (N. Y.) 421.

one, but not if it be a purely personal one containing the name of the retiring partner, except where the personal name has been made a trade-mark of the business. The retiring partner may go into business in his own name, but he must not use even his own name in such a manner as to mislead the public into believing that he is the old firm.[1]

4. The retiring partner may, however, by express agreement invest the continuing partner with the right to continue the former firm name, though it is a purely personal one; and the retiring partner may, in the same manner, limit his own right to resume business or to use or permit to be used his own name in connection with a new business to compete with the old.[2]

III. Of the Good-will.

§ 87. What is meant by the good-will.— What is known as the "good-will" of the business may properly be considered in connection with the name. The good-will is regarded as a valuable incident of the business, and may be sold or transferred as such. Precisely what it is the courts have found it difficult to define. "The term good-will," says

[1] See Williams v. Farrand (1891), 88 Mich. 473, 50 N. W. Rep. 446, 14 L. R. A. 161; Vonderbank v. Schmidt (1892), 44 La. Ann. 264, 10 So. Rep. 616, 32 Am. St. Rep. 336, 15 L. R. A. 462 and note; Brass and Iron Works Co. v. Payne (1893), 50 Ohio St. 115, 19 L. R. A. 82; Myers v. Kalamazoo Buggy Co. (1884), 54 Mich. 215, 19 N. W. Rep. 961, 20 id. 545, 52 Am. Rep. 811; Snyder Manufacturing Co. v. Snyder (1896), — Ohio St. —, 43 N. E. Rep. 325. As to the use of individual names as trade-marks, see Fish Bros. Wagon Co. v. Fish (1892), 82 Wis. 546, 52 N.W. Rep. 545, 33 Am. St. Rep. 72, 16 L. R. A. 453; Marshall v. Pinkham (1881), 52 Wis. 585, 9 N. W. Rep. 615, 38 Am. Rep. 756; Russia Cement Co. v. Le Page (1888), 147 Mass. 206, 17 N. E. Rep. 304, 9 Am. St. Rep. 685: Shaver v. Shaver (1880), 54 Iowa, 208, 37 Am. Rep. 194, 6 N. W. Rep. 188.

[2] See Grow v. Seligman (1882), 47 Mich. 607, 41 Am. Rep. 737; Frazer v. Frazer Lubricator Co. (1887), 121 Ill. 147, 13 N. E. Rep. 639, 2 Am. St. Rep. 73; Symonds v. Jones (1890), 82 Me. 302, 19 Atl. Rep. 820, 17 Am. St. Rep. 485, 8 L. R. A. 570; Le Page Co. v. Russia Cement Co. (1892), 51 Fed. Rep. 941, 17 L. R. A. 354, 5 U. S. App. 112.

Mr. Justice Lindley,[1] "can hardly be said to have any precise signification. It is generally used to denote the benefit arising from connection and reputation; and its value is what can be got for the chance of being able to keep that connection and improve it." Mr. Justice Story[2] describes it as the benefit or advantage "which is acquired by an establishment beyond the mere value of the capital, stock, funds or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices." Lord Eldon[3] declared that "the good-will of a trade is nothing more than the probability that the old customers will resort to the old place;" and this is approved by Mr. Parsons,[4] who says: "It is a hope or expectation, which may be reasonable and strong, and may rest upon a state of things that has grown up through a long period and been promoted by large expenditures of money. And it may be worth all the money it has cost, and a great deal more; but it is, after all, nothing more than a hope, grounded upon a probability."

The term "good-will," however, as is pointed out in a late case[5] in Nebraska, is often used in three different senses: 1. That above indicated; 2. Where it is connected with or includes a trade-mark or trade-name;[6] and 3. Where it is coupled with an express agreement not to compete with the business with which it is connected. The first is the true use, and it is in that sense that the term is here used.

[1] 1 Lindley on Partnership (Ewell's 2d Am. ed.), 439.

[2] Story on Partnership, § 99.

[3] In Cruttwell v. Lye, 17 Ves. 335, 346. Many later cases, however, regard this definition as too narrow. See Trego v. Hunt (1896), Ap. Cas. 7.

[4] Parsons on Partnership (4th ed.), § 181.

[5] Lobeck v. Hardware Co. (1893), 37 Neb. 158, 55 N. W. Rep. 650, 23 L. R. A. 795.

[6] As an illustration of this form, the court cited Smith v. Walker (1885), 57 Mich. 456, 22 N. W. Rep.

§ 88. **Good-will as an asset.**— The good-will is a partnership asset. As a rule, it inheres in the business and not in the locality, though in the case of hotels, theaters and similar places the rule is otherwise.[1] It does not attach to the stock in trade, and does not necessarily pass with a sale of the stock. It does pass, however, with a sale of the business, or of all interest in or assets of the business.[2]

§ 89. **Disposition of good-will on dissolution.**— Upon a voluntary dissolution of the business, the good-will is an asset and will be sold for the benefit of the partners, if either partner desires such sale.[3] Upon a dissolution by death, the good-will does not go to the survivor alone, but is still a firm asset for whose value he must account if he obtains the benefit of it.[4]

The sale by one partner of the good-will does not, *of itself*, carry the right to the firm name, if it be a personal one including the name of the retiring partner, unless it has been made a trade-mark; neither does it, of itself and in the absence of an agreement not to do so, operate to prevent the retiring partner from starting a new business in competition with the old, or even, it has been held, prevent him from

267, 24 id. 830, 26 id. 783. See, also, as to the effect of the sale of business and good-will where the firm name has been made a trade-mark, Horton Mfg. Co. v. Horton Mfg. Co., 18 Fed. Rep. 816; Snyder Mfg. Co. v. Snyder (1896), — Ohio St. —, 43 N. E. Rep. 325. In the former case the court said: "If one has made of his own name a trade-mark, and then transfers to another his business, in which his name has been so used, the right to continue such use of the name will doubtless follow the business as often as it may be transferred."

[1] Chittenden v. Witbeck (1883), 50 Mich. 401; Musselman's Appeal (1869), 62 Pa. St. 81, 1 Am. Rep. 382; Booth v. Jarrett (1876), 52 How. Pr. (N. Y.) 169; Woodward v. Lazar (1863), 21 Cal. 448, 82 Am. Dec. 75; Armstrong v. Kleinhaus (1884), 82 Ky. 303, 56 Am. Rep. 894.

[2] Hoxie v. Chaney (1887), 143 Mass. 592, 58 Am. Rep. 149; Merry v. Hoopes (1888), 111 N. Y. 415; Williams v. Farrand (1891), 88 Mich. 473, 50 N. W. Rep. 446, 14 L. R. A. 161.

[3] Sheppard v. Boggs (1879), 9 Neb. 257; Snyder Mfg. Co. v. Snyder (1896), — Ohio St. —, 43 N. E. Rep. 325.

[4] Smith v. Everett (1859), 27 Beav. (Eng. Ch.) 446; Rammelsberg v. Mitchell (1876), 29 Ohio St. 22.

soliciting the trade of the old customers; though it will prevent him from carrying on the new business in such a way as to make it appear to be the old one.[1]

IV. Of the Capital of the Firm.

§ 90. What constitutes capital.— The capital of the firm is the aggregate of the sums which the partners have agreed to contribute for the transaction of the partnership business. It differs from the property of the firm, inasmuch as the capital is a fixed sum, while the amount of property possessed by the firm may vary from time to time, and be more or less than the capital. It differs also from advances made by the partners to the firm, for the latter are in the nature of loans to the firm, and not contributions to its fixed capital.[2]

§ 91. Fixing amount and interests.— In the final distribution of assets upon the winding up of the partnership business, capital is usually to be distributed among the partners in proportion to the capital contributed, and it is therefore desirable to have the amount of the capital and the shares of each partner definitely fixed, though, where nothing appears to the contrary, it will be presumed that their shares are equal.

The amount of the capital as originally determined cannot subsequently be increased or diminished without the consent of all of the partners.

§ 92. What may be received as contributions to capital. The contributions to the capital need not be in money, but

[1] See Knoedler v. Glaenzer (1893), 55 Fed. Rep. 895, 14 U. S. App. 336, 20 L. R. A. 733; Vonderbank v. Schmidt (1892), 44 La. Ann. 264, 32 Am. St. Rep. 336, 15 L. R. A. 462; Williams v. Farrand (1891), 88 Mich. 473, 50 N. W. Rep. 446, 14 L. R. A. 161: Vernon v. Hallam (1886), 34 Ch. Div. 748. A partner, however, who has agreed to sell the good-will to his partner cannot, before the dissolution has taken place, proceed to copy from the firm books the names of the firm customers for the purpose of soliciting their custom when the dissolution is complete. Trego v. Hunt (1896), Ap. Cas. 7.

[2] 1 Lindley on Partnership (Ewell's 2d ed.), 320.

may be made in real or personal property, labor, skill, or whatever the parties may agree to receive as such. Neither is it necessary that each partner shall contribute the same kind of thing, for one may contribute money and another property and another skill, and the like. The *use* only of property may also be contributed, the partner retaining to himself as an individual the title to it. It is not necessary that the several contributions shall be equal in amount or value; for one may contribute much while another contributes little.

It does not follow, however, where one contributes money, and the other skill, experience or labor, that they will ultimately own this money together (though capital is firm property, and though property bought with it for partnership purposes would be partnership property), or that upon a termination of the partnership they will share it in common; for, as will be seen, upon such a termination each partner is to be repaid his contributions to capital before the profits are divided.[1]

V. Of the Property of the Firm.

1. *Of Firm Property in General.*

§ 93. What may be partnership property.— The property of the firm may be that originally contributed by the partners to form the partnership capital, or it may be that subsequently acquired in partnership dealings. It may be either real or personal. Unless provided otherwise by the articles or by statute, there is no limit to the kind or amount of the property which the firm may possess.

Somewhat different rules apply when the property is real estate, and these will be made the subject of separate mention.

§ 94. What constitutes partnership property.— What property is partnership property, or when it becomes such,

[1] See Shea v. Donahue (1885), 15 Lea (Tenn.), 160, 54 Am. Rep. 407; Whitcomb v. Converse (1875), 119 Mass. 38, 20 Am. Rep. 311.

is not always easy to determine. "Not only all the goods and merchandise properly so called," says Mr. Parsons,[1] "but all chattels bought by the partnership, or otherwise coming to them, as their furniture, books, etc., are partnership property; and so also all bills of exchange and notes, or other evidence of debts, and all debts or accounts or balances, or other claims; and all shares in companies, or scrip bought with partnership funds, or otherwise assigned to the partnership and not transferred to the individual partners and charged in their accounts, would be regarded as partnership property."

§ 95. Same subject — Property bought by partner in his own name.— Whether property bought by one partner in his own name is partnership property depends upon the circumstances and the intention. One partner may, of course, buy property for himself; but where he takes title in his own name to property bought with partnership funds, there is a strong presumption that it is partnership property, though he may show that, by arrangement with his partners, it was really to be his own; as, for example, that the funds were loaned to him with which to buy the property on his own account. If, however, he takes title in himself when it was his duty to take it for the firm, the firm may require him to transfer to it; and, though he buys in his own name, if he was really buying for the firm, the firm is liable to the seller. It is simply the application of the rules of agency, the firm being the principal, and the partner the agent.[2]

§ 96. Same subject — Property used by the firm.— Not all property used by the firm is firm property; for, as has been seen, the partners' contribution to the firm capital may be simply the use of property and not its title; and, during the continuance of the relation, the firm may acquire, by

[1] Parsons on Partnership, § 177.

[2] See Traphagen v. Burt (1876), 67 N. Y. 30; Davis v. Davis (1882), 60 Miss. 615; Kruschke v. Stefan (1892), 83 Wis. 373, 53 N. W. Rep. 679.

lease or otherwise, the right to use or employ the individual property of a partner as well as of a stranger.

§ 97. Nature of each partner's interest in the firm property.—In the absence of any special agreement prescribing a different rule, *all* the members of the firm are interested in the *whole* of the partnership property. They are, however, neither joint tenants nor tenants in common, but the possessors of a peculiar interest. That interest is simply each partner's *share* in whatever surplus may remain after the debts and obligations of the firm are paid.[1] It is a right, not to partition or distribution of the property in kind, but to have the assets sold and the proceeds divided after the payment of partnership debts and obligations. The partners may, indeed, by agreement, divide the surplus of the property after the payment of the debts, in kind, if they see fit to do so, but neither can claim such a division as a matter of right; and if the estate is settled in court the property will be sold and the surplus divided in money.[2] The rule is the same whether the property is real or personal.

§ 98. Extent of each partner's interest.—This share or interest of each partner is obviously made up of two kinds of items: 1. That, if anything, which is due to be returned to him on account of his original contributions to capital.[3] 2. That, if anything, which is due to him on account of profits.[4] The distribution of profits, of course, cannot take place until the contributions to capital have been restored. The ratio of distribution of the two funds — capital and profits — *may* be the same, but it is not *necessarily* so. It will be the same where the parties have agreed that profits or losses are to be divided in the same proportions as the

[1] Sindelare v. Walker (1891), 137 Ill. 43, 27 N. E. Rep. 59, 31 Am. St. Rep. 353; Menagh v. Whitwell (1873), 52 N. Y. 146, 11 Am. Rep. 683, Ames' Cas. on Partn. 229; Staats v. Bristow (1878), 73 N. Y. 264, Paige's Partn. Cas. 106.

[2] Wild v. Milne (1859), 26 Beavan, 504, Ames' Partn. Cas. 178.

[3] See *post*, § 304.

[4] See *post*, §§ 304, 305.

contributions to capital; but, where nothing is shown respecting such an agreement, it will be presumed that the profits or losses are to be shared equally. This will be the presumption even though it appears that the contributions to capital were unequal.[1] Speaking of shares in this sense, that is, of shares in the profits and losses as distinct from contributions to capital, Mr. Justice Lindley says: "Whether partners have contributed money equally or unequally, whether they are or are not on a par as regards skill, connection or character, whether they have or have not labored equally for the benefit of the firm, their shares will be considered as equal unless some agreement to the contrary can be shown to have been entered into."[2]

§ 99. **The transfer of shares.**— Such being the nature of a partner's share or interest, it is clear that he has no title to any specific article or portion of the partnership property, and hence can neither assign, sell nor mortgage any particular portion of it as his own. The utmost that he can do is to transfer his share or interest in the whole assets, and the value of such share or interest can only be conclusively determined upon a winding up of the partnership affairs.[3] Of this nature only, therefore, is the right which is transferred by a partner's sale or assignment of his interest, or which passes to his representative upon his death, or which can be claimed by the legatee under his will, or which devolves upon his assignee in bankruptcy or insolvency.

A partner may, indeed, transfer such interest as he has, and this limited interest will often be held to pass under a conveyance by which he has attempted to transfer a greater right.[4]

[1] 1 Lindley on Partnership (Ewell's 2d Am. ed.), 348, 349; Robinson v. Anderson, 20 Beavan, 98; Peacock v. Peacock, 16 Ves. 49.

[2] 1 Lindley on Partnership (Ewell's 2d Am. ed.), 349.

[3] Collins' Appeal (1883), 107 Pa. St. 590, 52 Am. Rep. 479; Whigham's Appeal (1869), 63 Pa. St. 194, Paige's Partn. Cas. 163; Sindelare v. Walker (1891), 137 Ill. 43, 27 N. E. Rep. 59, 31 Am. St. Rep. 353; Menagh v. Whitwell (1873), 52 N. Y. 146, 11 Am. Rep. 683.

[4] See Carrie v. Cloverdale Co., 90 Cal. 84.

The transfer of his interest, however, does not operate to introduce the grantee into the firm, but it dissolves the partnership, leaving to the grantee the right to the value of the share acquired as determined upon the final accounting.

An exception to this rule of dissolution exists in joint-stock companies, mining partnerships, and others in which, by statute or agreement, the shares of the members are transferable.

§ 100. Seizure of partner's share by his individual creditor.— In most states the share or interest of one partner in the property of the partnership may be levied upon and sold on execution at the suit of his individual creditors; but no specific chattels can be so seized or sold, and the only right acquired by the purchaser is the right to an accounting and to secure the partner's interest after the settlement of the partnership affairs and the payment of the partnership debts.[1]

The method of procedure in seizing and selling the partner's interest is not uniform, though the right is generally recognized.

2. *Of the Title to Personal Property.*

§ 101. May be held in firm name.— As has been already stated, the title to personal property may be acquired, held and disposed of by the firm in the firm name, and this is the proper and appropriate manner in which the title to such property should be taken, held and disposed of. Bills of sale and chattel mortgages may therefore be made to or by the firm in the firm name, subject to the disabilities, hereafter to be noticed, attaching to the execution of instruments under seal. Choses in action, as well as choses in possession, may be acquired or transferred in the name of the firm.

[1] Gerard v. Bates (1888), 124 Ill. 150, 16 N. E. Rep. 258, 7 Am. St. Rep. 350; Williams v. Lewis (1888), 115 Ind. 45, 17 N. E. Rep. 262, 7 Am. St. Rep. 403; Nixon v. Nash (1861), 12 Ohio St. 647, 80 Am. Dec. 390; Morrison v. Blodgett (1836), 8 N. H. 238, 29 Am. Dec. 653; Hutchinson

§ 102. May be held in the name of one partner for the firm. — But personal property may be firm property although the title is taken or held in the name of one partner only. It may have been so taken and held with the consent of all of the partners, in which case their rights to it, as between themselves, are clear; but it may also have been so taken or held by one partner in violation of his duty to the firm, but in this case also, as has been seen, equity regards it as firm property and will protect the rights of the other partners in it.

§ 103. Title is in firm collectively. — Whether, however, the title be in the firm name or in that of one partner for the firm, the ownership of the property is not in the partners as individuals, but in the firm as such. The partners are therefore, as has been seen, neither joint tenants nor tenants in common, but the possessors of that peculiar interest already described, known as the partner's share. One partner, therefore, as has been already noted, can neither sell, assign nor mortgage any specific chattel, but simply his interest in the whole assets.[1]

3. *Of the Title to Real Estate.*

§ 104. Legal title to real property cannot be taken in firm name. — Partnership real estate stands upon peculiar footing. A partnership may own or deal in lands, but it is incapable, as a partnership, of taking or holding the legal title to lands in the firm name, inasmuch as it is incapable of acting to such an extent as a separate legal entity. A conveyance to the firm by name operates, therefore, either to pass no title at all, as where the name is a wholly fictitious one,[2] or to vest the legal title in those partners whose individual names appear in the firm name.[3]

Where, therefore, it is desired to convey real estate to a

v. Dubois (1881), 45 Mich. 143; Whigham's Appeal (1869), 63 Pa. St. 194, Paige's Partn. Cas. 163.

[1] See *ante*, § 99.

[2] Compare Tidd v. Rines (1879), 26 Minn. 201, with Byam v. Bickford (1885), 140 Mass. 31.

[3] See *ante*, § 84, and note.

firm, the utmost that can be done is to vest the title in the partners as individuals for the firm; and for this purpose the most unequivocal method is to make the deed run to all of the partners in their individual names, as partners doing business under the firm name which may have been adopted, and expressly declaring that they are to hold it as such partners and for partnership purposes.

§ 105. **But the equitable title is in the firm.**— But though the firm as such cannot, in the firm name, hold the legal title to real estate, the equitable title to firm realty is in the firm, and equity will regard and protect the land as partnership property. For this purpose, the person or persons holding the legal title, whether one partner or all, will be regarded as holding in trust for the firm.[1]

§ 106. **When land is partnership property.**— The question whether land held in the name of one partner or of all is partnership property or not, where there is no unequivocal evidence of the intention, is one of much importance and frequently of great difficulty. The question may be raised either by the partners themselves, or by the heirs or widow of a deceased partner, or by the separate creditors of the partner in whose name the legal title may be vested, claiming priority over the firm creditors.

The chief criterion by which the question is to be determined, as is declared in a recent case, is the intention of the partners. "That intention," said the court,[2] "may be expressed in the deed conveying the land, or in the articles of partnership; but when it is not so expressed, the circumstances usually relied upon to determine the question are the ownership of the funds paid for the land, the uses to

[1] See Riddle v. Whitehill (1889), 135 U. S. 621, 10 Sup. Ct. Rep. 924, 34 L. ed. 282; Paige v. Paige (1887), 71 Iowa, 318, 32 N. W. Rep. 360, 60 Am. Rep. 799; Harris v. Harris (1891), 153 Mass. 439, 26 N. E. Rep. 1117; Hatchett v. Blanton (1882), 72 Ala. 423; Shanks v. Klein (1881), 104 U. S. 18, Paige's Partn. Cas. 136.

[2] Robinson Bank v. Miller (1894), 153 Ill. 244, 38 N. E. Rep. 1078, 46 Am. St. Rep. 883, 27 L. R. A. 449.

which it is put, and the manner in which it is entered upon the books of the firm.[1] Where real èstate is bought with partnership funds for partnership purposes, and is applied to partnership uses, or entered and carried in the accounts of the firm as a partnership asset, it is deemed to be firm property; and, in such case, it makes no difference, in a court of equity, whether the title is vested in all the partners as tenants in common, or in one of them, or in a stranger.[2] If the real estate is purchased with partnership funds, the party holding the legal title will be regarded as holding it subject to a resulting trust in favor of the firm furnishing the money. In such case no agreement is necessary, and the statute of frauds has no application."[3]

§ 107. Same subject.— Where the land was purchased in their individual capacity by persons who thereafter became partners, the question whether it has been converted into

[1] Citing here, 1 Bates on Partnership, § 280; 2 Lindley on Partnership, marg. p. 649; 17 Am. & Eng. Ency. of Law, 945. In Lindsay v. Race (1894), 103 Mich. 28, it is said: "Whether lands held in the name of one partner or of both are to be deemed copartnership property is generally a question of intent, to be gathered from the manner in which the members of the firm have dealt with them. While the fact that the funds of the copartnership have been used in paying for the lands, when originally purchased or subsequently, is not conclusive of this intent, yet it is persuasive evidence, and when, as in this case, it is accompanied by the entry of the transaction on the firm books as a copartnership transaction, under circumstances which import a daily declaration that it was so regarded, it is convincing."

[2] Citing here, Parsons on Partnership (4th ed.), § 265; 1 Bates on Partn., § 281; Johnson v. Clark, 18 Kan. 157. To same effect: Page v. Thomas (1885), 43 Ohio St. 38, 54 Am. Rep. 788; Collner v. Greig (1890), 137 Pa. St. 606, 21 Am. St. Rep. 899; Pepper v. Thomas (1887), 85 Ky. 539; Ross v. Henderson (1877), 77 N. C. 170; Roberts v. Eldred (1887), 73 Cal. 394.

[3] Citing here, Parker v. Bowles, 57 N. H. 491; Bates on Partn., *supra*. To same effect: Riddle v. Whitehill (1889), 135 U. S. 621, 10 Sup. Ct. Rep. 924, 34 L. ed. 282; Way v. Stebbins (1882), 47 Mich. 296, 11 N. W. Rep. 166; Paige v. Paige (1887), 71 Iowa, 318, 32 N. W. Rep. 360, 60 Am. Rep. 799; Galbraith v. Tracy (1894), 153 Ill. 54, 38 N. E. Rep. 937, 28 L. R. A. 129, 46 Am. St. Rep. 867.

partnership land is one of greater difficulty, and the authorities cannot be reconciled. In the case[1] quoted from in the preceding section it is said: "The theory of some of the cases is that real estate bought with separate, and not partnership, funds cannot be converted into firm property by a verbal agreement between the partners, because no trust can be created in lands unless by writing, in view of the statute of frauds, except such as results by implication of law.[2] There are cases which hold that, even though the land was originally bought by the several partners with their individual funds, and deeded to them as tenants in common, yet it will be regarded in equity as firm property where it is improved out of partnership funds for firm purposes, and actually used for such purposes, or where the firm puts valuable and permanent improvements upon it for firm purposes, and which are essential to the firm. In some instances the land is held to be the property of the partners, and the improvements to be the property of the firm.[3]

"The use of the property is not conclusive of its character as real estate or personalty, but is only evidence of the intention of the parties. When the intention of the partners to convert the land into firm property is inferred from circumstances, the circumstances must be such as do not admit of any other equally reasonable and satisfactory explanation.[4] And where it is sought to show a conversion of the land into personalty by agreement of the partners, such agreement must be clear and explicit."[5]

[1] Robinson Bank v. Miller (1894), 153 Ill. 244, 38 N. E. Rep. 1078, 46 Am. St. Rep. 883, 27 L. R. A. 449.

[2] Citing here, Parker v. Bowles (1876), 57 N. H. 491.

[3] Citing 1 Bates on Partnership, §§ 281, 282, 285.

[4] Citing Parsons on Partnership, § 267.

[5] Citing 17 Am. & Eng. Ency. of Law, 954. In National Union Bank v. National Mechanics' Bank (1895), 80 Md. 371, 30 Atl. Rep. 913, 27 L. R. A. 449, 45 Am. St. Rep. 350, it is said that where the land was originally owned by the partners as individuals, and so stands upon the public records, something more than the mere intent of the partners or the entries upon their own books is necessary to convert the property into firm property as

§ 108. Nature of partner's interest in partnership realty.— The interest of each partner in the partnership real estate, like his interest in the partnership personal property, is not a title to any specific parcel or to any specific portion, but simply an interest in the residue after the partnership debts have been paid and its affairs are wound up.[1] Until that purpose is accomplished, therefore, he can sell, assign or mortgage no greater interest, nor can more be taken upon process against him at the suit of his individual creditors.

§ 109. Partnership realty, when deemed personal estate.— The English rule regards partnership realty as partnership capital and as having in all respects the character of personal property; but the American rule is otherwise. In this country the partnership realty retains its character as such for most purposes, though the firm may deal with it as personal estate,[2] and equity will regard it as personalty

against individual creditors. Compare Goldthwaite v. Janney (1894), 102 Ala. 431, 15 So. Rep. 560, 28 L. R. A. 16; Alkire v. Kahle (1888), 123 Ill. 496, 17 N. E. Rep. 693, 5 Am. St. Rep. 540.

[1] See Du Bree v. Albert (1882), 100 Pa. St. 483; Henry v. Anderson (1881), 77 Ind. 361; Kruschke v. Stefan (1892), 83 Wis. 373.

[2] Thus, in Woodward-Holmes Co. v. Nudd (1894), 58 Minn. 236, 59 N. W. Rep. 1010, 27 L. R. A. 340, it is said: "During the continuance of the partnership the partners can convey or mortgage it, in the course of their business, whenever they see fit, without their wives joining in the conveyance or mortgage, and the wives would have no dower or other interest in it. This is one of the very objects of treating partnership real estate as personal property; for otherwise the business of the firm might be stopped, and the partners unable to realize on the assets of the firm, by reason of the wife of one of them refusing to join in the conveyance or mortgage. They have the same power of disposition over it for the purposes of a dissolution of the partnership, the payment of its debts, and the distribution or division of the capital among themselves; for until that is done the property has not fulfilled its functions as personalty, or ceased to be partnership property." So in Rovelsky v. Brown (1891), 92 Ala. 522, 9 So. Rep. 182, 25 Am. St. Rep. 83, it is held that one member of a firm, engaged in the business of buying and selling real estate, can bind the firm by a contract in the firm name for the sale of partnership land, and that such contract will be specifically enforced against all the partners.

for the purpose of paying the debts and settling the partnership affairs to the exclusion of heirs, widow or the creditors of the individual partners.[1] As soon as that purpose is accomplished, however, the realty resumes its character as such. It therefore descends to the heir of a deceased partner, though charged with the trust in favor of the partnership;[2] and the widow of a deceased partner may have dower in it[3] after the firm debts are paid.

§ 110. Bona fide purchaser from partner having legal title.— Partnership lands, therefore, when found to be such, are liable to the partnership creditors, and the latter take precedence over the creditors of an individual partner in whose name the legal title stands, and over a transfer by such partner of the legal title to any one not a *bona fide* purchaser. But a *bona fide* purchaser or mortgagee of partnership lands, in ignorance that they were such, from the partner having the legal title of record, will be protected as against both the other partners and creditors.[4]

§ 111. Interest of surviving partner in firm realty.— Upon the dissolution of the partnership by death, the entire legal title to all the partnership personalty vests, as will be

[1] See Robinson Bank v. Miller (1894), 153 Ill. 244, 38 N. E. Rep. 1078, 46 Am. St. Rep. 883, 27 L. R. A. 449; Paige v. Paige (1887), 71 Iowa, 318, 32 N. W. Rep. 360, 60 Am. Rep. 799; Mallory v. Russell (1887), 71 Iowa, 63, 60 Am. Rep. 776; Willet v. Brown (1877), 65 Mo. 138, 54 Am. Rep. 265; Fairchild v. Fairchild (1876), 64 N. Y. 471.

[2] Martin v. Morris (1885), 62 Wis. 418, 22 N. W. Rep. 525; Galbraith v. Tracy (1894), 153 Ill. 54, 38 N. E. Rep. 937, 46 Am. St. Rep. 867, 28 L. R. A. 129.

[3] Brewer v. Browne (1880), 68 Ala. 210; Strong v. Lord (1883), 107 Ill. 25.

[4] Norwalk Nat. Bank v. Sawyer (1882), 38 Ohio St. 338; McNeil v. Congregational Society (1884), 66 Cal. 105; Seeley v. Michell (1887), 85 Ky. 508, 4 S. W. Rep. 190; Tarbell v. West (1881), 86 N. Y. 287; Kepler v. Savings & Loan Co. (1882), 101 Pa. St. 602. See, also, National Union Bank v. National Mechanics' Bank (1895), 80 Md. 371, 30 Atl. Rep. 913, 27 L. R. A. 449, 45 Am. St. Rep. 350; Goldthwaite v. Janney (1894), 102 Ala. 431, 15 So. Rep. 560, 28 L. R. A. 16.

seen hereafter,[1] in the survivor. With respect of the partnership realty, however, a somewhat different rule prevails. The real estate, though treated as personalty in the United States for many purposes, retains its character as realty so far as the exigencies of the partnership affairs will permit. The legal title to it — unless it had been vested for the firm in the name of one partner only who chances to be the survivor — descends, as has been seen,[2] to the heirs subject to the partnership needs, but the equitable title vests in the surviving partner for the purpose of paying the firm debts and settling up the partnership affairs in substantially the same manner that the legal title to the personal assets vests in him. As such survivor he may, therefore, convey, when necessary, the equitable title to part or all of the partnership realty, and the court will then require the heirs or other holders of the legal title to convey that legal title to the person who has purchased the equitable title from the surviving partner.[3]

[1] See *post*, § 268.

[2] See *ante*, § 109.

[3] See Shanks v. Klein (1881), 104 U. S. 18, 26 L. ed. 635, Paige's Partn. Cas. 186; Walling v. Burgess (1889), 122 Ind. 299, 7 L. R. A. 481; Tillinghast v. Champlin (1856), 4 R. I. 173, 67 Am. Dec. 510; Buffum v. Buffum (1861), 49 Me. 108, 77 Am. Dec. 249.

CHAPTER VII.

OF THE RIGHTS AND DUTIES OF PARTNERS TOWARDS EACH OTHER.

§ 112. **Duty to exercise good faith.**— The relation of partners to each other is one of great confidence and trust, and the law demands from them the exercise of the highest integrity and good faith toward each other. Each one is bound to use the partnership property and exercise his partnership powers for the benefit of the firm and not for himself alone. Profits made in the course of the partnership belong to the firm, and one partner will not be permitted to make gain for himself at the expense of the firm. Secret commissions made by one partner upon partnership dealings must be accounted for to the firm, and if one partner takes advantage of his position to acquire for himself that which ought to be acquired for the firm, he will be required to transfer it to the firm. So one partner will not be permitted, either directly or indirectly, to buy of or for himself or to sell to or for himself on the partnership account, without

the knowledge and consent of the other partners; and in their dealings with each other, in relation to partnership matters, each is required to make a full disclosure of all facts within his knowledge affecting the transaction. This duty of good faith is intensified when one partner is conducting the business alone as managing partner.[1]

§ 113. Duty not to carry on other business to prejudice of firm.— Partners may agree in their articles or otherwise that one or more partners may carry on other business, or be relieved in whole or in part from giving their time and efforts to the firm business; but in the absence of such an agreement, a partner has no right to give his time, skill or capital to another business or firm to the prejudice of his partners. If he clandestinely carries on the same business

[1] See Brooks v. Martin (1863), 2 Wall. (U. S.) 70, and Kimberley v. Arms (1888), 129 U. S. 512, as to the duties of a managing partner. See, also, Trego v. Hunt (1896), Ap. Cas. 7.

See Hodge v. Twitchell (1885), 33 Minn. 389, 23 N. W. Rep. 547, and Newell v. Cochran (1889), 41 Minn. 374, 43 N. W. Rep. 84, as to secret commissions made by one partner; Caldwell v. Davis (1887), 10 Colo. 481, 3 Am. St. Rep. 599, as to the duty to make full disclosure in dealings with each other; Johnson's Appeal (1886), 115 Pa. St. 129, 2 Am. St. Rep. 539, and Mitchell v. Reed (1874), 61 N. Y. 123, 19 Am. Rep. 252, that if one partner takes a renewal in his own name of an existing lease to the firm, it inures to the benefit of the firm. This seems to be true even after a dissolution of the firm, because the chance of renewal is a firm asset. See, also, to the effect that one partner who buys up a claim against the firm at a discount must give the firm the benefit: Easton v. Strother (1881), 57 Iowa, 506; that one who buys in property belonging to the firm, as upon a sale on execution, must hold for the firm: Railsback v. Lovejoy (1886), 116 Ill. 442; Roby v. Colehour (1890), 135 Ill. 300; that insurance of firm property, taken in the name of one partner, inures to the firm: Tebbetts v. Dearborn, 74 Me. 392; that one partner cannot apply firm property to his own uses: Morrison v. Blodgett (1836), 8 N. H. 238, 29 Am. Dec. 653; that one partner cannot through a third person secretly purchase firm assets sold on dissolution: Jones v. Dexter (1881), 130 Mass. 380, 39 Am. Rep. 459, and note; that one partner cannot avail himself of information acquired as a partner to aid him in carrying on another business in competition with the firm: Aas v. Benham (1891), 2 Ch. 244; Latta v. Kilbourn (1893), 150 U. S. 524, 37 L. ed. 1169.

as that of the firm and in competition with it, he may be compelled to account to the firm for the profits which he makes,[1] but he will not be compelled to account if the business is a different and non-competing one.[2]

"If a member enter into a transaction in his own behalf, which is within the scope of the partnership business," said the court in one case, "his copartner may insist that it is a fraud upon him and claim the benefit resulting from it; yet this is a right which the partner can alone assert, and it is not available to third persons for the purpose of fixing a liability upon the partnership when such claim has not been asserted."[3]

§ 114. **Duty to exercise care and skill.**— It is the duty of each partner, and he impliedly if not expressly agrees, to transact the business of the firm with reasonable care, skill, diligence and economy; and if the firm sustains injury by reason of his failure to do so, he must bear the loss,[4] though he will not be liable for a loss caused by honest mistake or error of judgment not amounting to gross negligence or ignorance.[5]

§ 115. **Duty to conform to partnership agreements.**— It is also the duty of each partner to conform to all of the agreements, regulations and restrictions imposed by the partnership articles, and to confine his acts within the scope and limits fixed for the partnership business. If, by reason of his breach of duty in these respects, a loss happens to his partners, he must indemnify them.

[1] See Goldsmith v. Eichold (1891), 94 Ala. 116, 33 Am. St. Rep. 97; Todd v. Rafferty (1878), 30 N. J. Eq. 254.

[2] Aas v. Benham (1891), 2 Ch. 244; Latta v. Kilbourn (1893), 150 U. S. 524, 37 L. ed. 1169; Metcalfe v. Bradshaw (1893), 145 Ill. 124, 33 N. E. Rep. 1116, 36 Am. St. Rep. 478.

[3] Lockwood v. Beckwith (1858), 6 Mich. 168.

[4] Yetzer v. Applegate (1891), 83 Iowa, 726, 50 N. W. Rep. 66.

[5] Charlton v. Sloan (1888), 76 Iowa, 288, 41 N. W. Rep. 303. One partner cannot hold the other liable when both have been equally negligent. Insley v. Shire (1895), 54 Kan. 793, 39 Pac. Rep. 713, 45 Am. St. Rep. 308.

Thus, where the partners expressly agreed that no one of them should sign, accept or indorse negotiable paper except for their own legitimate purposes, and one of them used the firm name for the accommodation of a third person in such a way that the firm was held liable, the offending partner was compelled to make good the loss to his partners.[1] And where one partner who had stipulated to render certain services for the firm refused without reasonable cause to do so, it was held that he was answerable to his partners for the value of the services.[2]

§ 116. **Duty of partners to keep accounts.**— It is the right of every partner to have true and proper accounts kept of the partnership transactions, and to have these accounts, at all reasonable times, open to his inspection at the place of business. The general duty of keeping the accounts may, by the articles, be devolved upon one partner, or upon a clerk; but even in such a case, as well as when there is no agreement, it is the duty of each partner to make and keep, or enable such partner or clerk to keep, correct accounts of his transactions. Where a partner fails in his duty in this regard, every reasonable presumption will be made against him upon the final accounting.[3]

§ 117. **Duty to consult with each other.**— In every important exigency in the partnership affairs, where one partner is about to act, he should consult with his partners unless the circumstances are such as to prevent or excuse him from so doing. Thus, where one partner, without consulting his copartner — whose knowledge of the subject would have rendered the purchase unnecessary — bought in for a large

[1] Murphy v. Crafts (1858), 13 La. Ann. 519, 71 Am. Dec. 519.

[2] Marsh's Appeal (1871), 69 Pa. St. 30, 8 Am. Rep. 206.

[3] See Kelly v. Greenleaf (1843), 3 Story (U. S. C. C.), 105; Webb v. Fordyce (1880), 55 Iowa, 11; Hall v. Clagett (1877), 48 Md. 223; Pierce v. Scott (1861), 37 Ark. 308; Pomeroy v. Benton (1882), 77 Mo. 64; Diamond v. Henderson (1879), 47 Wis. 172; Knapp v. Edwards (1883), 57 Wis. 191.

sum an apparent but really unfounded claim against the firm real estate, it was held that his act was gross negligence and that he could not require his copartner to contribute to the expense of the purchase.[1]

§ 118. Right of each partner to share in management of the business.— Unless they have agreed otherwise, it is the right of each partner to take an equal part in the transaction of the firm's business. Each has an equal right to information about its business and projects, to have free access to its books and accounts, and to participate generally in the conduct of its affairs. "Although one may have an interest only in the profits and not in the capital," said the court in one case,[2] his right to participation is the same because "his rights are involved in the proper conduct of the affairs of the firm, so that profits may be made."

§ 119. Right of partner to extra compensation.— In the absence of special agreement, a partner is not entitled to compensation for his services for the partnership, but must be content with his share of the profits, if any.[3] It makes no difference that his services are more valuable than those of any other partner, or that he performs a greater portion of the duties than any other.[4] Nor does the fact that one partner is disabled by sickness from rendering any service give another partner, who performs it all, a claim for compensation, for such sickness is one of the risks incident to the relation.[5] Even where one partner winds up the business of the firm, he is not ordinarily entitled to extra compensation;[6] though he has been held to be entitled to it

[1] Yorks v. Tozer (1894), 59 Minn. 78, 60 N. W. Rep. 846, 28 L. R. A. 86.

[2] Katz v. Brewington (1889), 71 Md. 79, 20 Atl. Rep. 139.

[3] Major v. Todd (1890), 84 Mich. 85, 47 N. W. Rep. 841; Godfrey v. White (1880), 43 Mich. 171, 5 N. W. Rep. 243; Hyre v. Lambert (1892), 37 W. Va. 26, 16 S. E. Rep. 446; Ligare v. Peacock (1884), 109 Ill. 94; Redfield v. Gleason (1888), 61 Vt. 220, 15 Am. St. Rep. 889.

[4] Burgess v. Badger (1888), 124 Ill. 288.

[5] Heath v. Waters (1879), 40 Mich. 457.

[6] Barry v. Jones (1872), 11 Heisk. (Tenn.) 206, 27 Am. Rep. 742.

where, after dissolution by death, he carries on the business successfully with the consent of those interested, until it could be wound up.[1]

If one partner is thus ordinarily not entitled to extra compensation for his services, it is all the more clear that he will not be so entitled where he has wrongfully excluded his partner from participation in the business.[2]

§ 120. Same subject — May be agreement to pay it.— But there may be an agreement to pay a partner for his services as such, and this agreement may be express or implied. "Where it can be fairly and justly implied," said the court in one case,[3] "from the course of dealing between the partners, or from circumstances of equivalent force, that one partner is to be compensated for his services, his claim will be sustained." It has been so implied, for example, where one partner gave his whole time to strangers for a salary which he retained, leaving the claimant partner to manage the firm business alone.[4] It has been implied also from the acquiescence and course of dealing of the partners.[5]

Where one partner is expressly to be paid in consideration of extra services, he will not be entitled to pay if such services are not rendered, even though he was disabled by illness.[6]

[1] Robinson v. Simmons (1888), 146 Mass. 167, 15 N. E. Rep. 558, 4 Am. St. Rep. 299; Zell's Appeal (1889), 126 Pa. St. 742.

[2] Hannaman v. Karrick (1893), 9 Utah, 236, 33 Pac. Rep. 1039.

[3] Emerson v. Durand (1885), 64 Wis. 111, 54 Am. Rep. 593.

[4] Emerson v. Durand (1885), 64 Wis. 111, 54 Am. Rep. 593; Morris v. Griffin (1891), 83 Iowa, 327, 49 N. W. Rep. 846. See, also, Askew v. Springer (1884), 111 Ill. 662; Weeks v. McClintock (1887), 50 Ark. 198; Lassiter v. Jackman (1882), 88 Ind. 118.

[5] Winchester v. Glazier (1890), 152 Mass. 316, 25 N. E. Rep. 728, 9 L. R. A. 424. As to validity of subsequent promise to pay in consideration of past extra services, see Gray v. Hamil (1889), 82 Ga. 375, 6 L. R. A. 72.

[6] Kinney v. Maher (1892), 156 Mass. 252, 30 N. E. Rep. 818.

§ 121. Right of partner to interest on money advanced. A partner who advances money for partnership purposes is usually held to be not entitled to interest upon it, unless there has been an agreement express or implied to pay interest, though by some authorities it is allowed.[1] Mercantile usage, however, and the course of dealing between the partners may be sufficient to sustain an implication of a promise to pay interest. "Slight circumstances," said the court in one case,[2] "may be sufficient to show such an undertaking."

§ 122. Right of partners to have partnership property applied to partnership debts.— It is the right of each partner to have the partnership property applied to the payment of the partnership debts, and for the enforcement and protection of this right he is often said to have a lien upon or equity in the property.

Whether the right or equity of the partners is strictly to be deemed a lien, as it is so often called, is perhaps open to question, though the name cannot be regarded as of great importance while the right itself, by whatever name it may be called, is clearly settled both in reason and authority.[3]

Out of this right grow two rules of much importance:

§ 123. —— Partner cannot apply partnership property to his own uses.— *First.* One partner cannot, without the consent of the other, apply the partnership property to his own uses or to his own debts, and of this the parties who deal with him must take notice at their peril.

One partner, therefore, without the express or implied consent of his copartners, cannot pledge, mortgage or assign partnership property in security or payment of his own debts; he cannot apply partnership funds in satisfaction of his own obligations; he cannot use the firm's name or credit

[1] See Prentice v. Elliott (1883), 72 Ga. 154; Baker v. Mayo (1880), 129 Mass. 517; Whitcomb v. Converse (1875), 119 Mass. 38, 20 Am. Rep. 311.

[2] Winchester v. Glazier (1890), 152 Mass. 316, 25 N. E. Rep. 728, 9 L. R. A. 424.

[3] See *post*, ch. XVIII.

on his private account; he cannot set off a private account against a debt due the firm: in all these and similar cases the firm is not bound, and the firm's property, funds or credits may be recovered unless the other party is in a situation to claim the protection afforded to a *bona fide* holder for value and without notice.[1]

The right of one partner to make such an application of the partnership assets with the previous consent or subsequent ratification of the other partners is clear enough, where the claims of the partnership creditors are not thereby impaired. Whether it can be done with such consent at the expense of the partnership creditors depends upon other considerations, similar to those involved in the following section, and hereafter more fully to be examined.

§ 124. —— **Claims of partnership creditors based on rights of partners.**— *Secondly*. Upon dissolution of the partnership and a division of its assets by the court, this right will be enforced, based upon the presumption that such is the wish of each partner, and the partnership creditors will be given a preference in the partnership assets over the individual creditors of the partners. The rule is sometimes stated, as will be more fully seen hereafter,[2] that the partnership creditors have a lien upon, and an absolute right to priority of payment out of, the partnership property; but the weight of modern authority is to the effect that their rights are based upon this right of each partner to have the firm property applied to the partnership debts.[3] As is said

[1] See Davies v. Atkinson (1888), 124 Ill. 474, 16 N. E. Rep. 899, 7 Am. St. Rep. 373 and note; Cannon v. Lindsay (1887), 85 Ala. 198, 3 So. Rep. 676, 7 Am. St. Rep. 38; Janney v. Springer (1889), 78 Iowa, 617, 43 N. W. Rep. 461, 16 Am. St. Rep. 460; Farwell v. St. Paul Trust Co. (1891), 45 Minn. 495, 48 N. W. Rep. 326, 22 Am. St. Rep. 742; Bruckett v. Downs (1895), 163 Mass. 70, 39 N. E. Rep. 776; Rogers v. Betterton (1894), 93 Tenn. 630, 27 S. W. Rep. 1017; Cowen v. Hardware Co. (1892), 95 Ala. 324, 11 So. Rep. 195.

[2] See *post*, ch. XVIII.

[3] See Winslow v. Wallace (1888), 116 Ind. 324, 17 N. E. Rep. 923; Purple v. Farrington (1889), 119 Ind. 164, 4 L. R. A. 535, 21 N. E. Rep. 543; Ellison v. Lucas (1891), 87 Ga. 224, 27 Am. St. Rep. 242, 13

in one case: "The rule that obtains in the distribution of the estates of partners, and under which partnership creditors are entitled to priority of payment out of the partnership assets, is an equitable doctrine, for the benefit and protection of the partners respectively. Partnership creditors have no lien upon partnership property. Their right to priority of payment out of the partnership assets over the individual creditors is always worked out through the lien of the partners."

§ 125. Partner's right to contribution and indemnity from copartners.—As will be seen hereafter,[1] the obligation of those debts and liabilities which are binding upon the firm is the joint obligation of all the partners and not the several obligation of any of them; they should therefore be borne by all the partners and not by one alone. It results, then, that if one partner pays or is compelled to bear more than his just share of such debts and liabilities, he is entitled to demand that his copartners shall, for his relief, contribute their due proportion thereof.[2]

So if, in the conduct of the partnership affairs, one partner is called upon to advance money for partnership purposes, or fairly and in good faith incurs an obligation on the firm account, he is entitled to reimbursement from the firm for his outlay, and to be indemnified by the firm against such obligation.[3]

The partner's right to reimbursement or indemnity, however, will not arise if the demand, with respect of which he claims it, was one which by agreement he was to bear alone,

S. E. Rep. 445; Reyburn v. Mitchell (1891), 106 Mo. 365, 27 Am. St. Rep. 350, 16 S. W. Rep. 592; Goldsmith v. Eichold Bros. (1891), 94 Ala. 116, 33 Am. St. Rep. 97, 10 So. Rep. 80; Arnold v. Hagerman (1888), 45 N. J. Eq. 186, 14 Am. St. Rep. 712, 17 Atl. Rep. 93; Hundley v. Farris (1890), 103 Mo. 78, 23 Am. St. Rep. 863, 12 L. R. A. 254, 15 S. W. Rep. 312; Carver Machine Co. v. Bannon (1887), 85 Tenn. 712, 4 Am. St. Rep. 803, 4 S. W. Rep. 831.

[1] See *post*, § 209.

[2] See Forbes v. Webster (1829), 2 Vt. 58; Lyons v. Murray (1888), 95 Mo. 23, 8 S. W. Rep. 170, 6 Am. St. Rep. 17.

[3] See Wheeler v. Arnold (1874), 30 Mich. 304.

or if it was not fairly and in good faith incurred, or if the necessity for it arose only through his own negligence, bad faith or breach of duty.[1]

§ 126. —— **On illegal transactions.**—"There is a saying," remarks Mr. Justice Lindley,[2] "that there is no contribution amongst wrong-doers; but this doctrine is certainly inapplicable to partners in the general form in which it is enunciated. It is true that, if a partnership is itself illegal, no member of it can, in respect of any transaction tainted with the illegality which infects the firm, obtain relief against any other member; but there is no authority for saying that if one of the members of a firm sustains a loss owing to some illegal act not attributable to him, but yet imputable to the firm, such loss must be borne entirely by him, and that he is not entitled to contribution in respect thereof from the other partners. The claim of a partner to contribution from his copartners in respect of a partnership transaction cannot be defeated on the ground of illegality unless the partnership is itself an illegal partnership; or unless the act relied on as the basis of the claim is not only illegal, but has been committed by the partner seeking contribution when he knew or ought to have known of its illegality. In any of these cases he can obtain no assistance against his copartners, and must abide the consequences of his own wilful breach of the law.[3] . . . But if the partnership is not itself illegal, and if the partner claiming contribution has not himself been personally guilty of a breach of the law, his claim will prevail, although the loss in respect of which it is made may have arisen from an unlawful act."

§ 127. —— **How enforced.**— Whether one partner has really paid more than his just proportion on the partnership

[1] See McFadden v. Leeka (1891), 48 Ohio St. 513, 28 N. E. Rep. 874.

[2] 1 Lindley on Partnership (Ewell's 2d ed.), 378.

[3] Quoted with approval in Smith v. Ayrault (1888), 71 Mich. 475, 39 N. W. Rep. 724, 1 L. R. A. 311.

account is often, if not usually, a question requiring some investigation of the whole partnership accounts to determine. If he has done so upon one occasion, it may be that his copartner upon some other occasion has paid as much or more under similar circumstances for which he also has a claim against the firm; and how the final balance will stand may be a matter of some uncertainty, which it will require a general accounting to make clear. As will be seen in the succeeding chapter, courts of law are not usually an appropriate forum for taking such an account, and the parties are required to go into a court of equity. The result, therefore, is, that a partner's claim for contribution or reimbursement is usually one to be enforced only in a court of equity.[1] It is not, however, always so. The claim may arise in respect of some isolated transaction; it may be that the other partner has recognized its validity and expressly promised to pay his share;[2] it may be that the demand did not arise until after an accounting or a dissolution and accounting:[3] in these and like cases, as will be seen in the succeeding chapter, the objection to legal proceeding may be removed, and a court of law rather than of equity may take jurisdiction.

[1] See Lawrence v. Clark (1840), 9 Dana (Ky.), 257, 35 Am. Dec. 133; Kennedy v. McFaddon (1811). 3 H. & J. (Md.) 194, 5 Am. Dec. 434.

[2] See *post*, §§ 139, 140.

[3] See Logan v. Trayser (1890), 77 Wis. 579, 46 N. W. Rep. 877; Sears v. Starbird (1889), 78 Cal. 225, 20 Pac. Rep. 547.

CHAPTER VIII.

OF ACTIONS BETWEEN PARTNERS.

§ 128. **Of actions between partners in general.**— The question of the remedies which partners may have between themselves involves several considerations of interest and importance. Certain of the rules applicable result from the peculiar relations between the parties, and others from the peculiar nature of the interests involved. As has been already seen, while the law for some purposes regards the

firm as a distinct entity, for most purposes the partners must be regarded as individuals. This is usually the rule as respects actions at law. If, therefore, one partner would maintain an action against the firm, he must sue himself as a partner with the others. If he should recover judgment against the firm, he might be called upon as a member of the firm to pay or satisfy his own judgment. If he bases an action upon his interest in the partnership, it will usually require an accounting and settlement to determine what his interest is. The same difficulties would usually exist if the firm were to sue one partner. These, and other like considerations, have led to the establishment of certain rules respecting the remedies of partners as between themselves which require examination.

I. Actions at Law.

§ 129. In what cases the question arises.— The question of the right to maintain an action at law respecting partnership transactions may arise in four classes of cases: 1. Where the claim is by one partner against the firm; 2. Where the claim is by the firm against a partner; 3. Where the claim is by one partner against one or more of his fellow-partners; and 4. Where the claim is between firms which have one or more partners in common.

1. *Partner against Firm.*

§ 130. One partner cannot sue the firm at law.— 1. One partner cannot maintain an action at law against the firm of which he is a member to recover upon any claim which he may have against the firm as such. The reasons are evident. He is himself a member of the firm against which he makes the claim, and if he should sue the firm he must sue himself as one member of it. To be thus both plaintiff and defendant involves an inconsistency which the law does not permit. It is, moreover, ordinarily impossible for him to show, without a final settlement of its accounts, whether the firm really owes him or not. There may be counter-

claims of such extent that a final balance would prove him to be the debtor; and to reach this final balance the remedies of the common law are usually not adequate.

One partner, therefore, cannot sue the firm at law to recover for his services where there is an agreement to pay; or to recover for advances or loans which he has made to the firm, or for money which he has paid out on its account, or for goods which he has sold to the firm, or for the rent of premises which he has leased to the firm.[1] In all these and like cases, the remedy of the partner, as will be seen, is to go into a court of equity, praying for an accounting and, usually, for a dissolution.

2. *Firm against Partner.*

§ 131. Firm cannot sue one partner at law.— 2. For similar reasons, the firm as such cannot sue one partner at law to recover upon a claim made against him by the firm. The same difficulty of parties, and the same uncertain character of the claim, exist as where the situation is reversed, as seen in the preceding section.

Thus, the firm as such cannot maintain an action at law against one partner to recover for goods sold to him by the firm, or for the recovery of money due from him to the firm upon his note or otherwise, though a *bona fide* indorsee of the note might sue.[2]

[1] See Newby v. Harrell (1888), 99 N. C. 149, 6 Am. St. Rep. 503, 5 S. E. Rep. 284; Duff v. Maguire (1868), 99 Mass. 300; O'Brien v. Smith (1889), 42 Kan. 49, 21 Pac. Rep. 784; Remington v. Allen (1871), 109 Mass. 47; Mickle v. Peet (1875), 43 Conn. 65; Pico v. Cuyas (1873), 47 Cal. 174.

Where a partner loans money to the firm and takes the firm's note, the note is valid, though the partner himself cannot sue upon it, and if he indorses to a holder for value, the latter may recover of the firm (Carpenter v. Greenup (1889), 74 Mich. 664, 42 N. W. Rep. 276, 16 Am. St. Rep. 666, 4 L. R. A. 241; Walker v. Wait (1878), 50 Vt. 668); though this would not be the result if the transfer were merely to enable the transferee to sue (Wintermute v. Tarrant (1890), 83 Mich. 555, 47 N. W. Rep. 358); or if the note were so transferred that the action must be brought in the name of the assignor. Davis v. Merrill (1883), 51 Mich. 480, 16 N. W. Rep. 864.

[2] See Parker v. Macomber (1836), 18 Pick. (Mass.) 505; Bank v. Del-

3. *Partner against Partner.*

§ 132. **One partner cannot sue another at law on claim arising out of partnership transactions.**— 3. The question of the right of one partner to sue another may arise: (*a*) Out of partnership transactions; (*b*) Out of matters relating to the partnership, but not involving partnership transactions; and (*c*) Upon matters having no connection with the partnership.

a. In the first of these cases it is the general rule that one partner cannot sue another partner at law upon a claim against that partner arising out of partnership transactions unless the partnership accounts, at least so far as that claim is concerned, have been fully settled, and a final balance has been arrived at in his favor; or, as it is frequently expressed, unless there has been an *account stated* between them. If such a balance has been reached in his favor, then, if there is no express promise, the law will usually imply a promise by the other partner to pay it, and the claim becomes, by the accounting and promise, so far transformed from a partnership liability into a personal and private one, that the partner entitled may sue the partner obligated in an action at law.[1]

§ 133. ——**Reason for the rule.**—The reason for the general rule denying the right to sue at law is that it is ordinarily impossible to determine whether the defendant partner is really indebted to the plaintiff partner or not until the partnership accounts are settled and the true standing of the parties ascertained; and the process and remedies afforded by a court of law are not usually adequate or appropriate to the investigation of claims requiring such an accounting. Where, however, the parties themselves have made an investigation and have stated the result showing a

afield (1891), 126 N. Y. 410, 27 N. E. Rep. 797; Burley v. Harris (1836), 8 N. H. 233, 29 Am. Dec. 650; Ivy v. Walker (1880), 58 Miss. 253.

[1] Douthit v. Douthit (1892), 133 Ind. 26, 32 N. E. Rep. 715. See, also, Beede v. Fraser (1894), 66 Vt. 114, 28 Atl. Rep. 880, 44 Am. St. Rep. 824.

balance due to one of the partners, the chief objection to a suit at law is obviated and it may therefore be maintained.

§ 134. —— **When rule does not apply.**— The general rule, moreover, has been held not to apply where the partnership was a special one, for a single and finished transaction only, or where all of the partnership affairs have been settled except a single transaction, or where the accounts are so simple and easily adjusted as to leave no necessity for an accounting in equity.[1]

§ 135. **One partner may sue another at law upon claim connected with but not involving partnership transactions.**— *b.* But there is a large class of cases involving matters which, though they are connected with the partnership, do not constitute partnership transactions, but are individual transactions between particular partners, and as to these an action at law may be maintained. Thus —

§ 136. —— **As for not forming partnership as agreed.**— A breach of an agreement to enter into partnership, or to permit a person to become partner, may furnish the basis of an action at law, because here, though a partnership was contemplated, it was never created, and there can consequently be no partnership transactions involved, and no necessity for an accounting.[2]

§ 137. —— **Or for dissolving contrary to agreement.**— For like reasons, an action at law may be maintained by one partner against another who has dissolved the partnership in violation of his agreement that it should continue for a definite term.[3]

§ 138. —— **Or for not furnishing capital as agreed.**— An action at law may be maintained by one partner against

[1] See Fry v. Potter (1880), 12 R. I. 542; Kutz v. Dreibelbis (1880), 126 Pa. St. 335, 17 Atl. Rep. 609; Wheeler v. Arnold (1874), 30 Mich. 304; Clarke v. Mills (1887), 36 Kan. 393.

[2] Hill v. Palmer (1882), 56 Wis. 123, 43 Am. Rep. 703.

[3] Bagley v. Smith (1853), 10 N. Y. 489, 61 Am. Dec. 756.

another to recover damages for the latter's breach of his agreement to contribute capital or furnish goods, or do any other act to start or launch the partnership.[1] "An agreement to pay money or to furnish stock," said the court in a recent case,[2] "for the purpose of launching the partnership, is an individual engagement of each partner to the other, and the defaulting partner may be sued in an action at law upon his agreement. It is entirely separate and distinct from the partnership accounts, and this forms the true test in determining whether an action at law will lie by one partner against his copartner."

§ 139. —— **Or for not reimbursing for capital advanced.** If one partner advances money, or pays for goods, or furnishes any other thing at the request of the other to enable the latter to supply his portion of the agreed capital, an action at law will lie for reimbursement.[3]

§ 140. —— **Or for not indemnifying as agreed.**—If one partner agrees with another to pay a firm debt out of his private funds or to hold the other harmless from liability by reason of any partnership transaction, an action at law may be maintained for a breach of the agreement.[4]

§ 141. —— **Or for not paying debts assumed.**—If one partner upon dissolution agrees to pay the debts of the firm, or to collect the debts and pay over a share of the collection, an action at law may be maintained if the agreement is broken.[5]

[1] See Scott v. Campbell, 30 Ala. 728; Sprout v. Crowley, 30 Wis. 187.

[2] Cook v. Canny (1893), 96 Mich. 398, 55 N. W. Rep. 987. To like effect: Brown v. Tapscott (1840), 6 Mees. & Wels. 119, Ames' Cases on Partn. 468; Scott v. Campbell (1857), 30 Ala. 728; Sprout v. Crowley (1872), 30 Wis. 187.

[3] Bates v. Lane (1886), 62 Mich. 132, 28 N. W. Rep. 753; Bull v. Coe (1888). 77 Cal. 54, 18 Pac. Rep. 808, 11 Am. St. Rep. 235; Smith v. Kemp (1892), 92 Mich. 357, 52 N. W. Rep. 639.

[4] See Miller v. Bailey (1890), 19 Oreg. 539, 25 Pac. Rep. 27; Edwards v. Remington (1881), 51 Wis. 336; Kellogg v. Moore (1881), 97 Ill. 282.

[5] See Thropp v. Richardson (1890), 132 Pa. St. 399, 19 Atl. Rep. 218;

§ 142. —— Or, generally, where partnership transaction by agreement is transformed into individual one.— And, generally, the partners may, by express agreement, transform a partnership transaction into the individual one of one of the partners, and upon matters thus separated from the partnership affairs an action at law may be maintained.[1]

§ 143. One partner may sue another for breach of partnership agreements.— Actions at law may also be maintained by one partner against another for a breach of such stipulations or agreements in the partnership articles as were designed for the protection of the partner complaining, as upon a breach of an agreement not to sign the firm name as an accommodation indorser.[2]

§ 144. One partner may sue another for wrongful practices resulting in loss.— And the same rule would apply where one partner, by fraudulent practices, or by any wrongful act, in violation of his duty as a partner, should impose loss upon his partner, as by giving the firm note without authority for his private debt.[3]

§ 145. One partner may sue another for fraud in inducing partnership.— So an action at law will lie for misrepresentations or deceit by one partner in inducing another to become a partner.[4]

§ 146. On matters distinct from partnership one partner may sue another.— *a.* As to matters entirely distinct from

Ferguson v. Baker (1889), 116 N. Y. 257, 22 N. E. Rep. 400.

[1] See Ryder v. Wilcox (1869), 103 Mass. 24; Purvines v. Champion (1873), 67 Ill. 459; Neil v. Greenleaf (1875), 26 Ohio St. 567; Emery v. Wilson (1879), 79 N. Y. 78.

[2] See Stone v. Wendover (1876), 2 Mo. App. 247; Vance v. Blair (1849), 18 Ohio, 532, 51 Am. Dec. 467.

[3] See Fuller v. Percival (1879), 126 Mass. 381; Calkins v. Smith (1872), 48 N. Y. 614; Boughner v. Black's Adm'r (1886), 83 Ky. 521, 4 Am. St. Rep. 174.

[4] See Rice v. Culver (1880), 32 N. J. Eq. 601; Morse v. Hutchins (1869), 102 Mass. 439; Hale v. Wilson (1873), 112 Mass. 444.

the partnership affairs, one partner may, of course, sue another as freely as though in respect to other matters they did not sustain the relation of partner.[1]

4. *Firm against Firm having Common Partners.*

§ 147. One firm cannot sue another at law if there is a common partner.— 4. In the absence of a statute authorizing it, one firm cannot maintain an action at law against another firm if there are partners common to both firms. The death of the common partner will not remove the impediment as to matters arising before the death, nor will the dissolution of the firm. The nature of the claim is immaterial, if it is an obligation in favor of one firm and against the other as such. The forum for actions in such cases is the court of equity.[2]

It is not permitted, it is said in one case,[3] "that one of the parties should thus appear both as a plaintiff and defendant, in effect prosecuting an action against himself, in which, if a recovery were to be allowed, it would be in his favor and at the same time against himself. Nor, at law, would the contract or agreement between the two firms having a common member be recognized as creating a legal obligation or cause of action. The transaction would be treated as an attempt by a party to enter into a contract with himself.[4] The remedial system of the common law was too inflexible and restricted to enable it to adjust the complex rights and obligations of the parties under such circumstances. But in equity the agreements of the members of firms so related to each other were treated as obligatory, and the fact that one of the parties to the joint contract

[1] See Elder v. Hood (1865), 38 Ill. 538; Newsom v. Pitman (1892), 98 Ala. 526, 12 So. Rep. 412.

[2] See Hall v. Kimball (1895), 77 Ill. 161; Crosby v. Timolat (1892), 50 Minn. 171, 52 N. W. Rep. 526; Beacannon v. Liebe (1884), 11 Oreg. 443, 5 Pac. Rep. 273.

[3] Crosby v. Timolat, *supra*.

[4] Citing Bosanquet v. Wray, 6 Taunt. 597; De Tastet v. Shaw, 1 Barn. & Ald. 664, 669; Leake, Cont. 439, 440; McFadden v. Hunt, 5 Watts & S. 468; Price v. Spencer, 7 Phila. 178.

stood in the position of both an obligor and obligee did not stand in the way of affording such relief or remedy as might be found to be appropriate and necessary to the ends of justice."[1]

II. Of Actions in Equity.

§ 148. Equity the proper tribunal in partnership matters.— The court of equity is the chief and appropriate tribunal for the settlement of all controversies growing out of partnership transactions as such. Its principal function is in winding up the partnership affairs and arriving at the respective interests therein of the partners and creditors, but its aid may often be sought in other matters. Thus —

1. *Specific Performance.*

§ 149. In what cases granted.— Something of the power of the courts of equity to enforce specific performance of partnership agreements has been already considered in a previous section,[2] and, as there noticed, the jurisdiction is limited by the nature of the case. But such stipulations as are capable of specific performance will be enforced, either directly or negatively by an injunction against their breach.[3]

[1] Citing 1 Story, Eq. Jur., §§ 679, 680; Haven v. Wakefield, 39 Ill. 509; Chapman v. Evans, 44 Miss. 113; Calvit's Ex'rs v. Markham, 3 How. (Miss.) 343; Hayes v. Bement, 3 Sandf. 394.

[2] *Ante*, § 81.

[3] In 1 Lindley on Partnership, 478, it is said: "The court has enforced the following agreements entered into upon or with a view to a dissolution, namely: Agreements not to carry on business within a certain distance or for a certain space of time (Whittaker v. Howe, 3 Beavan, 383; Turner v. Major, 3 Giffard, 442); agreements as to the custody of partnership books and the furnishing of copies thereof (Lingen v. Simpson, 1 Simons & Stuart, 600); agreements that a third party, and he only, shall get in debts (Davis v. Amer, 3 Drew. 64; Turner v. Major, 3 Giff. 442); agreements that the value of the share of an outgoing or a deceased partner shall be ascertained in a specified way and taken accordingly (Morris v. Kearsley, 2 Y. & C. Ex. 139; Essex v. Essex, 20 Beav. 442; King v. Chuck, 17 Beav. 325); agreements that an outgoing partner shall offer his share to his copartners before selling it to other persons (Homfray v. Fothergill, 1 Eq. 567); agree-

The chief objections which arise to the exercise of the power to grant specific performance in partnership cases are those which inhere in the peculiar nature of the subject. Thus, where the purpose is to compel parties to enter into partnership as agreed, if no time was stipulated for its continuance, of what avail is it to enforce the creation of a partnership which the parties may immediately dissolve? — if a term of continuance was agreed upon, can the court assume the task of constantly watching the parties to observe whether they are performing their duties as partners?

§ 150. **Same subject.**— In one case[1] in which the question arose, the court, in denying the application, said: "It is extremely plain that the court cannot assume to enforce the performance of daily prospective duties, or supervise or direct in advance the course or conduct of one who is to control and manage in the interest of a firm in which he is to stand as a member, and where, too, the stipulated arrangement as plainly set forth contemplates that his personal skill and judgment shall be applied and govern according to the shifting needs of property and business. No court is competent to execute such an arrangement."

In another case,[2] involving the same question, the court said: "It is a rule in equity that the court will not decree a specific performance where it has no power to enforce the decree. Hence partnership articles will not be enforced, especially where no time is fixed for its continuance, as either party may dissolve it at pleasure. And even where a time is fixed it is difficult to see how the decree can be enforced. Take this case as an illustration: Is the court to keep its hand on the parties for seventeen years and compel them to carry on this business?"

ments to grant an annuity to a retiring partner and his widow (Aubin v. Holt, 2 K. & J. 66; Page v. Cox, 10 Hare, 163); agreements not to divulge or make use of a trade secret (Morison v. Moat, 9 Hare, 241)."

[1] Buck v. Smith (1874), 29 Mich. 166, 18 Am. Rep. 84.

[2] Morris v. Peckham (1883), 51 Conn. 128, Paige's Partn. Cas. 114.

§ 151. Same subject.— There may, nowever, be cases in which the court will enforce specific performance of an agreement to form a partnership, notwithstanding that it may be immediately dissolved. This will be done, for example, where it will secure to a partner the interests in property to [redacted]eement he is entitled.[1]

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44 Miss. 202; Van Keuren v. Trenton Mfg. Co. (1861), 13 N. J. Eq. 302; Levine v. Michael (1883), 35 La. Ann. 1121.

[2] See Wilson v. Fitchter (1885), 11 N. J. Eq. 71.

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ıg a notice of dissolution before
ˀed, and the like.[2]
ı for a dissolution or for an ac-
issued to restrain one partner
operty, creating new liabilities,

ıartner may be enjoined from
of or wrongfully dealing with

44 Miss. 202; Van Keuren v. Trenton Mfg. Co. (1861), 18 N. J. Eq. 302; Levine v. Michael (1883), 35 La. Ann. 1121.

[2] See Wilson v. Fitchter (1885), 11 N. J. Eq. 71.

the assets; from holding out the complainant as being still a partner; from continuing business in violation of his agreement; from using the old firm name in such a way as to render former partners liable, and the like.[1]

3. *Of Accounting and Dissolution.*

§ 153. In what cases granted.— The most common ground for appealing to a court of equity is to secure an accounting to determine the interests of partners and creditors, to adjust mutual claims and demands, and to obtain a decree for payment and distribution. The jurisdiction of a court of equity for these purposes is ample and its power to enforce its decrees complete.[2] Its aid, however, must be sought before the claim has become stale, and the complainant's laches may bar relief.[3]

An accounting is usually coupled with a demand for dissolution, and it was formerly the rule that accounting would not be granted where it would not be complete and final or unless it was coupled with a dissolution; but the modern authorities have relaxed this rule, and there are now cases in which an accounting alone may be granted. The most important of these, according to Mr. Justice Lindley,[4] are three: 1. Where one partner has sought to withhold from his copartner the profit arising from some secret transaction. 2. Where the partnership is for a term of years still unexpired, and one partner has sought to exclude or expel his copartner or to drive him to a dissolution. 3. Where the partnership has proved a failure, and the partners are too numerous to be made parties to the action, and a limited ac-

[1] See McGowan Co. v. McGowan (1872), 22 Ohio St. 370; Wilkenson v. Tilden (1881), 9 Fed. Rep. 683; Roberts v. McKee (1859), 29 Ga. 161; Shannon v. Wright (1883), 60 Md. 520; Fletcher v. Vandusen (1879), 52 Iowa, 448.

[2] See Bracken v. Kennedy (1842), 4 Ill. 558, Paige's Partn. Cas. 170; Clark v. Gridley (1871), 41 Cal. 119; Denver v. Roane (1878), 99 U. S. 355.

[3] See Bell v. Hudson (1887), 73 Cal. 285, 2 Am. St. Rep. 791, and note.

[4] 2 Lindley on Partnership (Ewell's ed.), 495.

count will result in justice to them all. To these may be added the case where the partnership agreements provide for periodical accountings or accountings as to distinct transactions.[1]

In these cases, however, an accounting will not, except in pursuance of partnership agreements, be granted of an isolated portion of what has been dealt with as a complete and general whole.[2]

The effect of the illegality of the transaction in an action for accounting has already been referred to.[3]

§ 154. Same subject — Who may demand accounting.— The application for the accounting may be made by a partner; by an employee who takes a share of profits by way of compensation for his services; by the personal representative of a deceased partner; by the assignee or purchaser of the interest of a partner; by the purchaser of a share upon a sale on execution; but not usually by a general creditor.[4]

4. *Of Receivers.*

§ 155. When will be appointed.— Receivers are frequently appointed in the settlement of partnership affairs, though the appointment is not a matter of course and will not be made unless good grounds exist for it. A receiver will not usually be appointed except upon dissolution; but the appointment may be made before, if a dissolution is inevitable, or if the partnership is insolvent and the assets are being wasted or improperly applied; but mere disputes or ill-feel-

[1] See Patterson v. Ware (1846), 10 Ala. 444; Wadley v. Jones (1875), 55 Ga. 329.

[2] See Davis v. Davis (1882), 60 Miss. 615.

[3] See *ante*, § 20. See, also, Pfeuffer v. Maltby (1881), 54 Tex. 454, 38 Am. Rep. 631; Pennington v. Todd (1890), 47 N. J. Eq. 569, 21 Atl. Rep. 297, 24 Am. St. Rep. 419.

[4] See Bentley v. Harris (1873), 10 R. I. 434, 14 Am. Rep. 695; Freeman v. Freeman (1884), 136 Mass. 260; Gerard v. Bates (1888), 124 Ill. 150, 7 Am. St. Rep. 350, 16 N. E. Rep. 258; Channon v. Stewart (1882), 103 Ill. 541, Paige's Partn. Cas. 179.

ing among the partners is not a sufficient ground.[1] It may be made also where one partner is insolvent and is wasting the assets or breaking up the business.[2] A receiver may be appointed to supersede a surviving partner or a sole managing partner if he is acting wrongfully or misusing or misapplying the assets.[3] One of the partners may be appointed receiver if he is otherwise a suitable person.

§ 156. **Powers and duties of receiver.**— The receiver is an officer of the court and acts under its direction. He may be authorized to continue the business long enough to permit its being wound up without sacrifice. He has not the title to the property, but the right of possession and disposition, and should be given control of all of the assets of the firm. He may sue in his own name to collect the debts, but he cannot usually be sued without the consent of the court, nor can creditors of the firm levy upon the property in his possession.[4]

[1] See New v. Wright (1870), 44 Miss. 202, Paige's Partn. Cas. 181.

[2] See Shannon v. Wright (1883), 60 Md. 520; Phillips v. Trezevant (1872), 67 N. C. 370.

[3] See Word v. Word (1889), 90 Ala. 81.

[4] See Jackson v. Lahee (1886), 114 Ill. 287, 2 N. E. Rep. 172; Morey v. Grant (1882), 48 Mich. 326, 12 N. W. Rep. 202; Henning v. Raymond (1886), 35 Minn. 303, 29 N. W. Rep. 132.

CHAPTER IX.

OF THE POWERS OF PARTNERS.

§ 157. In general.— The relation of partnership, as has been seen, creates the relation of principal and agent between the partners, each partner being at once principal of and agent for the others. Courts which have adopted the

idea of the distinct entity of the partnership regard each partner as agent for the firm, as a collective body, rather than as principal for himself and agent for the others. The results, however, are not materially different, and it is sufficient for our purpose to say that the power of each partner to bind himself and his partners — or, in other words, to bind the firm — rests substantially upon the general principles of agency.

It will be evident that the power of the partner-agent to bind his principal, *i. e.*, his partners or the firm, presents the same two aspects that have been discovered in the law of agency, namely:

(1) The power as between the partner and the firm, and
(2) The power as between the firm and third persons.

1. Powers as Between the Partners Themselves.

§ 158. As between themselves, partners may fix powers by agreement.— It has been seen that, between the agent and the principal, the powers of the agent may be fixed by their agreement, and that, as between these parties, the agreement so made is usually conclusive, even though, as between the principal and third persons, the principal may be held liable for the agent's exercise of more extended powers. The same rule applies here. The partners may by their own agreement determine the powers which shall be exercised by each partner, and between themselves this agreement, unless expanded or waived, will be conclusive. It will also be conclusive as respects third persons who have notice of the agreement; but secret limitations upon the usual powers of a partner can be no more conclusive upon third persons who have no notice of them than are secret limitations upon the usual powers of an agent. The result may be, therefore, as in the case of agency, that a partner may, by exceeding secret limitations but acting within the usual powers, bind the firm to third persons, and, at the

same time, make himself liable to his partners for the loss they may sustain by reason of his act.[1]

§ 159. If no powers agreed upon, usual powers implied.— If, however, the partners have not expressly agreed upon the powers that shall be exercised by each, then they must be taken as having impliedly agreed that the usual and ordinary powers of partners in similar cases may be exercised. In this event, the question as between the partners will be substantially the same as between the firm and third persons, and the question then arises, What are the usual or the implied powers of a partner? As this question is, therefore, to be answered in substantially the same way between whatever parties it may arise, we will consider it, for both purposes, under the head of the implied powers of partners as respects third persons.

II. Powers as Between the Firm and Third Persons.

§ 160. Of what matters third persons must take notice.— It was found in the law of Agency that third persons would not be justified in proceeding blindly upon the assumption that an agent really possessed every power which he might undertake to exercise; but that they must investigate his authority and act in good faith and with reasonable prudence. The same principle applies here. Persons dealing with a partner as such are bound to determine the existence of the partnership and to take heed of all limitations of which the nature and extent of the business may give notice, as well as of those restrictions which are actually brought to their knowledge.

§ 161. Nature and extent of business to be observed.— The nature and scope of the business are therefore to be regarded. It may be limited to a single venture or transaction, and in such a case limitations similar to those imposed

[1] See Leavitt v. Peck (1819), 3 Conn. 125, 8 Am. Dec. 157; Stone v. Wendover (1876), 2 Mo. App. 247; Vance v. Blair (1849), 18 Ohio, 532, 51 Am. Dec. 467.

by a special agency must be observed. It may be confined to a single line of business, and in such a case the implied authority must be limited by the usages of that business, unless the partners have, by their words or conduct, given it a wider scope. It may be a business of a particular kind, as in the case of a professional partnership, in respect of which the law recognizes but limited powers. Of all such facts third persons must take notice, and must be bound by the legal conclusions to be drawn from them.[1]

§ 162. **Same subject — Distinction between trading and non-trading firms.**— Perhaps the most important distinction to be observed as to the nature of the partnership business is that drawn between trading and non-trading firms. "The test of the character of the partnership," it is said in a recent case, "is buying and selling. If it buys and sells, it is commercial or trading. If it does not buy or sell, it is one of employment or occupation." By this is meant, of course, buying and selling as a business, and not as a mere incident to some other business or occupation. The distinction is an important one; for, as can readily be seen, and as will be more fully observed hereafter, much greater powers may properly be regarded as incident to a commercial or trading business than to one for the exercise of a profession

[1] Where a partnership is limited to a particular trade or business, one partner cannot bind his copartner by any contract not relating to such trade or business, and third persons will be presumed to have knowledge of the limited nature of the partnership from circumstances connected with the business of the firm. Livingston v. Roosevelt (1809), 4 Johns. (N. Y.) 251, 4 Am. Dec. 273, 1 Am. Lead. Cas., p. 507 and note. Persons dealing with partners are bound by the agreement between the partners themselves if such persons, at the time of the dealing, knew the nature of such agreement, or had knowledge of such facts and circumstances relating thereto as would lead a man of common prudence to make inquiry about them. Bromley v. Elliott (1859), 38 N. H. 287, 75 Am. Dec. 182. To same effect: Baxter v. Rollins (1894), 90 Iowa, 217, 57 N. W. Rep. 838. See, also, Wilson v. Richards (1881), 28 Minn. 337; Cargill v. Corby (1852), 15 Mo. 425.

or occupation merely. Of this distinction and its legal consequences third persons are bound to take notice.[1]

In dealing with this question in a recent case,[2] the court, speaking of a farming partnership, said: "The partnership in this case is not a trading or commercial one, which is generally governed as to its scope of authority by the rules of the law-merchant, of which the courts take judicial cognizance. The principle governing a non-trading partnership is well settled. There are three classes of cases where each partner connected with such associations may lawfully bind the firm; the burden, in each case, being on the plaintiff to prove the facts by which such authority is established, or from which it may be implied: (1) Where he has express authority to do so; (2) where the contract made, or thing done, is necessary in order to carry on the business of the partnership; and (3) where it is usually or customarily incident to other partnerships of like nature."

§ 163. Same subject — The power of a partner to impose restrictions by dissent.— The limitations upon the implied powers of one partner may also be increased in certain cases by his copartner's dissenting to be bound by his contemplated acts. One partner cannot by secret dissent impose limitations upon his partner's power to bind the firm to third persons; neither can one partner by an open and communicated dissent, without a dissolution, deprive his partner of those powers which the partnership articles confer upon him; nor can he by such dissent impose upon third persons additional burdens or responsibilities, as, for example, to take away a dèbtor's right to pay to either partner; but as to the future exercise of implied powers, one of two partners may, by giving notice to third persons, prevent his being

[1] See Lee v. First National Bank (1890), 45 Kan. 8, 25 Pac. Rep. 196, 11 L. R. A. 238; Winship v. Bank of United States (1831), 5 Peters (U. S.), 529; Pease v. Cole (1885), 53 Conn. 53, 55 Am. Rep. 53; Smith v. Sloan (1875), 37 Wis. 285, 19 Am. Rep. 757.

[2] Woodruff v. Scaife (1887), 83 Ala. 152.

bound by the contemplated act of his partner.[1] Whether the same rule applies where there are more than two partners will be hereafter considered.[2]

§ 164. Of the partner as the agent of the firm.— Applying these considerations, the general rule may be said to be that each partner is the agent of the firm with implied powers to bind the partnership in all matters falling within the general and usual scope of the business as actually conducted; and that third persons dealing with one partner as such agent will be protected if they act in good faith, with reasonable prudence, and with no notice of any other limitations than those which the nature of the business as ostensibly carried on may afford.

Greater power may, of course, be conferred by the express or implied consent of the partners previously given, or by their subsequent ratification; but the rule stated refers to the authority to be implied from the nature of the business and the method of transacting it.

§ 165. Partner has no implied power outside of scope of business.— The first and most obvious limitation imposed by this rule is, that one partner has no implied power to bind the firm in any matter outside of the scope of the business as ostensibly carried on. Thus, as a few of many similar illustrations, it is not within the scope of the business of a firm of lumber manufacturers to subscribe for stock in a plank-road company; nor of a firm of millers, or planters and farmers, to carry on a grocery store; nor of an iron furnace partnership to buy a distillery; nor of a printing firm to undertake to sell pianos; nor of a firm of millers and grain dealers to speculate in futures; nor of a trading partnership

[1] See Leavitt v. Peck (1819), 8 Conn. 125, 8 Am. Dec. 157; Monroe v. Conner (1838), 15 Me. 178, 32 Am. Dec. 148; Noyes v. New Haven R. R. Co. (1861), 30 Conn. 1; Johnson v. Bernheim (1877), 76 N. C. 189; Johnston v. Dutton (1855), 27 Ala. 245; Wipperman v. Stacy (1891), 80 Wis. 345, 50 N. W. Rep. 336.

[2] See *post*, § 18[illegible].

to collect accounts for others, or buy land for speculation.[1] Other illustrations will be given under special heads.

§ 166. What meant by scope.—What is meant by the *scope* of the business is not capable of exact definition, but, in general, it means the limits commonly and usually fixed to a similar business at that time and place, and reasonably necessary to enable that business to be carried on. The usages of those engaged in the same business at the same time and place are therefore material to be observed as indicating not only what the partners themselves but third persons must have contemplated as falling properly within its purpose. The previous practice and conduct of the particular firm may also be of weight as indicating what the partners have determined to be authorized. Necessity alone is not enough, nor is the fact that benefit may have resulted from the act; it must fall within the usages of such a business, or at least within the usages of the particular business.

Scope is usually, perhaps, a question of fact to be determined by evidence of the circumstances,[2] but there are many cases in which the courts may determine, as matter of law, that a given act is not within the scope of a particular business.[3]

§ 167. Extending original scope by subsequent conduct.— The scope originally fixed by the partners for the conduct of their business may be subsequently enlarged with their consent. This consent may be given consciously and expressly, or it may be given, perhaps unconsciously, by acquiescence or implication. As the scope of the business is

[1] See Barnard v. Plank-road Co. (1859), 6 Mich. 274; Banner Tobacco Co. v. Jenison (1882), 48 Mich. 459; Irwin v. Williar (1883), 110 U. S. 499; Boardman v. Adams (1857), 5 Iowa, 224, Paige's Partn. Cas. 120; Humes v. O'Bryan (1883), 74 Ala. 64; Waller v. Keyes (1834), 6 Vt. 257; Pickels v. McPherson (1881), 59 Miss. 216; Brooks v. Hamilton (1821), 10 Mart. (La.) 283, 13 Am. Dec. 328.

[2] See London Savings Society v Savings Bank (1860), 36 Pa. St. 498 78 Am. Dec. 390.

[3] See Banner Tobacco Co. v. Jenison (1882), 48 Mich. 459, 12 N. W. Rep. 655.

extended, the range of the implied powers of the partners extends accordingly. As was said in one case[1] in which a firm of printers had gradually added piano selling to their business, "Where a partnership firm, embarked in a particular business to which their engagements are confined, and to which alone their partnership contracts extend, by mutual agreement enlarge the sphere of their operations and include another branch of business, the power of each partner to bind the firm by his contracts is co-extensive with the whole business of the partnership; and the acts of each member are as binding on the firm in the new branch of business in which they are engaged as they are in the former regular and ordinary business."

§ 168. **Consideration of particular powers.**— It is obviously impossible to enumerate all of the powers which may or may not fall within the scope of a particular partnership; but the question of the existence of several has so frequently arisen that they may be grouped together as further illustrations of the subject. Thus —

§ 169. —— **Admissions.**— The statements, representations and admissions of one partner are not admissible against another, unless he has in some way assented to them, either to prove the partnership or to prove that a given transaction was a partnership transaction; but if the existence of the partnership has been established by other evidence, then the admissions of one partner made during the continuance of the partnership, while engaged in the transaction of the partnership business and in reference to partnership affairs, are admissible against the firm. One partner cannot, however, by his admissions or declarations alone, deprive his partners of their interests in the firm property.[2]

[1] Boardman v. Adams (1857), 5 Iowa, 224, Paige's Partn. Cas. 120.

[2] See Drumright v. Philpot (1854), 16 Ga. 434, 60 Am. Dec. 738; Burgan v. Lyell (1851), 2 Mich. 102, 55 Am. Dec. 53; Griswold v. Haven (1862), 25 N. Y. 595, 82 Am. Dec. 380; Williams v. Lewis (1888), 115 Ind. 45, 17 N. E. Rep. 262, 7 Am. St. Rep. 403; Strong v. Smith (1892), 62

Where it is desired to prove by one partner either the existence of the partnership or who were the partners composing it, he should be called as a witness. While his extra-judicial *admissions* are not admissible, his *testimony* on the trial is competent.[1]

§ 170. —— **Appointing agents.**— Each partner has implied authority to employ such agents and servants as the proper transaction of the partnership may require.[2]

The firm may act as agent. Where the partners are appointed as individuals, all must ordinarily unite in executing the authority; but where the firm is the agent, any partner has implied power to execute the authority alone.[3]

§ 171. —— **Arbitration.**— One partner has no implied power to submit controverted partnership matters to arbitration. This is the prevailing rule whether the agreement to submit is under seal or not, though in a few states an unsealed agreement by one partner has been held binding. The power may, of course, be conferred by the consent of the other partners.[4]

§ 172. —— **Assignments for creditors.**— By the weight of authority it is settled, as a general rule, that one partner has no implied power to make a general assignment of the partnership property for the benefit of partnership creditors, though it will be valid if the other partners previously consent, either expressly or impliedly, or subsequently ratify

Conn. 89, 25 Atl. Rep. 895; First Nat. Bank v. Conway (1886), 67 Wis. 210, 30 N. W. Rep. 215.

[1] See First Nat. Bank v. Conway, *supra*.

[2] See Mead v. Shepard (1867), 54 Barb. (N. Y.) 474; Sweeney v. Neely (1884), 53 Mich. 421; Harvey v. McAdams (1875), 32 Mich. 472; Carley v. Jenkins (1874), 46 Vt. 721.

[3] See Deakin v. Underwood (1887), 37 Minn. 101, 33 N. W. Rep. 318, 5 Am. St. Rep. 827; Frost v. Erath Cattle Co. (1891), 81 Tex. 505, 17 S. W. Rep. 52, 26 Am. St. Rep. 831.

[4] See Fancher v. Furnace Co. (1886), 80 Ala. 481, 2 So. Rep. 268; Walker v. Bean (1886), 34 Minn. 427, 26 N. W. Rep. 232; Gay v. Waltman (1879), 89 Pa. St. 453; Davis v. Berger (1884), 54 Mich. 652, 20 N. W. Rep. 629.

it. To this general rule one exception is made: that if the other partners have absconded or are absent so that they cannot be consulted, or are otherwise incapable of assenting or dissenting, then one partner may make such an assignment without their consent.[1]

§ 173. —— **Attorneys.**— One partner has implied authority to employ attorneys to appear and represent the firm in suits to which the firm is a party.[2]

§ 174. —— **Bills and notes.**— The implied power of one partner to bind the firm upon negotiable paper depends largely upon the trading or non-trading character of the firm.

1. *In the case of a trading firm*, each partner has implied authority to bind the firm by making, accepting or indorsing, in its name, and in the course of its business, a bill or note for partnership purposes; and negotiable paper executed in the firm name by one partner in a trading firm will, *prima facie*, be presumed to bind the firm. But if the bill or note was not for partnership purposes, but was really in fraud of the firm — as if it were given, without the other partners' consent, for the individual debt or purposes of one partner,— it would not bind the firm in the hands of the original payee or of any other person who had notice of this fact, or who did not pay value for it. In the hands of a *bona fide* holder for value without notice, however, it would be binding upon the firm, and the latter would have recourse against the partner giving it. The original payee of paper given for the individual debt of the partner, or any other holder having notice of that fact, can only recover of

[1] See Loeb v. Pierpoint (1882), 58 Iowa, 469, 43 Am. Rep. 122; Shattuck v. Chandler (1889), 40 Kan. 516, 10 Am. St. Rep. 227; Sullivan v. Smith (1884), 15 Neb. 476, 48 Am. Rep. 354; Rumery v. McCulloch (1882), 54 Wis. 565; Stein v. La Dow (1868), 13 Minn. 412; Williams v. Frost (1880), 27 Minn. 255, Paige's Partn. Cas. 126; Hill v. Postley (1893), 90 Va. 200, 17 S. E. Rep. 946; Mayer v. Bernstein (1891), 69 Miss. 17.

[2] See Wheatley v. Tutt (1867), 4 Kan. 240; Charles v. Eshleman (1879), 5 Col. 107.

the firm by showing affirmatively that the other partners previously authorized or subsequently ratified its execution.[1]

2. *In the case of a non-trading firm*, however, one partner has, by the weight of authority, no implied power to bind the firm by making, accepting or indorsing negotiable paper, even though it was done in the scope of the partnership business and for its benefit. In such partnerships the power to make negotiable paper can only exist by virtue of the consent of the partners, the necessity of the case, or usage in that or similar firms. Such paper is therefore unenforceable not only in the hands of the original payee, but also of a *bona fide* holder for value, because the nature of the business is notice to every one of the limited powers of the partners. *A fortiori* could neither the original payee nor a *bona fide* holder recover if the paper were given for the individual debt of a partner. To enable any person to recover, therefore, upon negotiable paper given by a partner in a non-trading firm, the plaintiff must be prepared to show either such consent of the other partners, such necessity, or such usage as will take the case out of the general rule.[2]

[1] See Redlon v. Churchill (1882), 73 Me. 146, 40 Am. Rep. 345; Mechanics' Ins. Co. v. Richardson (1881), 33 La. Ann. 1308, 39 Am. Rep. 290; Sherwood v. Snow (1877), 46 Iowa, 481, 26 Am. Rep. 155; Howze v. Patterson (1875), 53 Ala. 205, 25 Am. Rep. 607; Walsh v. Lennon (1881), 98 Ill. 27, 38 Am. Rep. 75.

[2] See Pease v. Cole (1885), 53 Conn. 53, 55 Am. Rep. 53; Smith v. Sloan (1875), 37 Wis. 285, 19 Am. Rep. 757; Pooley v. Whitmore (1873), 10 Heisk. (Tenn.) 629, 27 Am. Rep. 733; Judge v. Braswell (1875), 13 Bush (Ky.), 67, 26 Am. Rep. 185; Lee v. First National Bank (1890), 45 Kan. 8, 11 L. R. A. 238; Levi v. Latham (1884), 15 Neb. 509, 48 Am. Rep. 361; Friend v. Duryee (1879), 17 Fla. 111, 35 Am. Rep. 89; Harris v. Baltimore (1890), 73 Md. 22, 25 Am. St. Rep. 565, 8 L. R. A. 677.

This rule has been applied to partnerships carrying on the real estate, loan and insurance business, Lee v. First National Bank, *supra;* Deardorf v. Thacher, 78 Mo. 128, 47 Am. Rep. 95; milling, Lanier v. McCabe, 2 Fla. 32, 48 Am. Dec. 173; water-works, Broughton v. Manchester Water-works, 3 Barn. & Ald. 1; gas works, Bramah v. Roberts, 3 Bing. N. Cas. 963; printing and publishing, Pooley v. Whitmore, *supra;* Bays v. Conner, 105 Ind. 415; planting, Prince v. Crawford, 50 Miss. 344; farming, Greenslade v. Dower, 7 Barn. & Cr. 635; Walker

§ 175. —— **Borrowing money.**— The power to borrow money rests upon substantially the same considerations as the power to execute negotiable paper, and is usually exercised with it. In a trading firm the power impliedly exists for partnership purposes,[1] but not, it is said, in a non-trading firm.[2] In the latter case it can be justified only by prior authority, necessity or subsequent ratification. If the borrowing was authorized, the firm is bound though the partner misappropriates the money.

§ 176. —— **Buying.**— The distinction between trading and non-trading firms is material, but not conclusive as to the implied power to buy. In the case of the trading firm, whose business it is, in whole or in part, to buy goods for use or sale, the power of each partner to buy such goods must clearly be implied. It must also be implied in the case of a non-trading firm if the purchase is within the scope of the business as actually conducted.[3]

v. Walker (1894), 66 Vt. 285, 29 Atl. Rep. 146; keeping a tavern, Cocke v. Branch Bank, 3 Ala. 175; carrying on a theater, Pease v. Cole, *supra;* operating a threshing machine, Horn v. City Bank, 32 Kan. 518; keeping livery-stable, Levi v. Latham, *supra;* carrying on a laundry, Neale v. Turton, 4 Bing. 149; digging tunnels, Gray v. Ward, 18 Ill. 32; practicing law, Friend v. Duryee, *supra;* or medicine, Crosthwait v. Ross, 1 Humph. (Tenn.) 23, 34 Am. Dec. 613; sawing lumber, Dowling v. National Bank (1891), 145 U. S. 512, 36 L. ed. 795, 12 Sup. Ct. Rep. 928; building, Sniveley v. Matheson (1895), 12 Wash. 88, 40 Pac. Rep. 628.

[1] See Rothwell v. Humphreys (1795), 1 Esp. 406, Ames' Cas. on Partn. 535, and note; Howze v. Patterson (1875), 53 Ala. 205, 25 Am. Rep. 607; Walsh v. Lennon (1881), 98 Ill. 27, 38 Am. Rep. 75; Sherwood v. Snow (1877), 46 Iowa, 481, 26 Am. Rep. 155; Harris v. Baltimore (1890), 73 Md. 22, 25 Am. St. Rep. 565, 8 L. R. A. 677; Gilchrist v. Brande (1883), 58 Wis. 184; Coller v. Porter (1891), 88 Mich. 549, 50 N. W. Rep. 658.

[2] But see Hoskinson v. Eliot (1869), 62 Pa. St. 393; Leffler v. Rice (1873), 44 Ind. 103.

[3] See Bond v. Gibson (1808), 1 Camp. 185, Ames' Cas. on Partn. 537, and note; Lynch v. Thompson (1883), 61 Miss. 354; Stillman v. Harvey (1879), 47 Conn. 27; Johnston v. Trask (1889), 116 N. Y. 136, 22 N. E. Rep. 377, 15 Am. St. Rep. 394, 5 L. R. A. 630; Porter v. Curry (1869), 50 Ill. 319, 99 Am. Dec. 520; Davis v. Cook (1879), 14 Nev. 265; Kenney v. Altvater (1874), 77 Pa. St. 34.

The purchase may be on credit, and may be of either real or personal property within the limits stated.

If the power exists, the firm is none the less bound because the partner buying subsequently misapplied the goods.

An unauthorized purchase may, of course, be ratified by the other partners.

§ 177. —— **Collecting and receiving payment.**— Every partner in a firm, whether trading or non-trading, has implied authority to receive payment of debts and other obligations due to the firm, and to give receipts or discharges therefor.[1] He may take a bill or note in payment,[2] though he cannot ordinarily take goods unless that is customary,[3] and, of course, he cannot accept his own outstanding note in payment, or offset the firm debt against one of his own, or accept goods for himself in payment of the debt due to the firm.[4]

§ 178. —— **Compromising debts.**— A partner's power to bind the firm by the compromise of a debt due to it is frequently laid down in general terms, but it is certainly not without limitation, and must, at least, be exercised without fraud or collusion, in good faith and with reasonable prudence.[5]

§ 179. —— **Confessing judgment.**— One partner has no implied power to confess judgment or to give a warrant of

[1] Allen v. Farrington (1855), 2 Sneed (Tenn.), 526; Major v. Hawkes (1850), 12 Ill. 298; Prentice v. Elliott (1883), 72 Ga. 154; Salmon v. Davis (1812), 4 Binn. (Pa.) 375, 5 Am. Dec. 410; Moist's Appeal (1873), 74 Pa. St. 166.

[2] Heartt v. Walsh (1874), 75 Ill. 200.

[3] Lee v. Hamilton (1854), 12 Tex. 418.

[4] Gregg v. James (1825), Breese (Ill.), 143, 12 Am. Dec. 151: Warder v. Newdigate (1851), 11 B. Mon. (Ky.) 174, 52 Am. Dec. 566; Farwell v. St. Paul Trust Co. (1891), 45 Minn. 495, 48 N. W. Rep. 326, 22 Am. St. Rep. 742.

[5] See 1 Lindley on Partnership, 136; Pierson v. Hooker (1808), 3 Johns. (N. Y.) 68, 3 Am. Dec. 467; Noyes v. Railroad Co. (1861), 30 Conn. 1; Hawn v. Land Co. (1887), 74 Cal. 418, 16 Pac. Rep. 196.

attorney to confess judgment against the firm upon a debt due by it, though the judgment may be valid against the partner as an individual.[1]

§ 180. —— **Deeds and instruments under seal.**—It is a general rule that one partner has no implied authority to bind the firm by deed, bond, mortgage or other instrument under seal; though the partner executing it may thereby bind himself in many cases, either upon the instrument itself or upon an implied warranty of authority. To sustain such instruments against the firm, when executed by a single partner, the previous authorization or subsequent ratification by the firm must be shown.[2] Contrary to the rule usually applicable in such cases, this authorization or ratification may be effected by parol.[3]

A release of a firm obligation is an exception to this rule forbidding the execution of sealed instruments; and in any case an act unnecessarily done under seal may, if otherwise valid, be sustained by the rejection of the seal as surplusage.[4]

§ 181. —— **Hiring property.**—One partner has implied power to bind the firm by contracts for the hiring of such property as the usual prosecution of the firm business requires. Thus, for example, one partner may bind the firm by a contract for the lease of premises on which to carry on

[1] See Hier v. Kaufman (18—), 134 Ill. 215, 25 N. E. Rep. 217; North v. Mudge (1862), 13 Iowa, 496, 81 Am. Dec. 441; Morgan v. Richardson (1852), 16 Mo. 409, 57 Am. Dec. 235; Soper v. Fry (1877), 37 Mich. 236. In Pennsylvania, see Boyd v. Thompson (1893), 153 Pa. St. 78, 25 Atl. Rep. 769, 34 Am. St. Rep. 685. In Virginia, see Alexander v. Alexander, 85 Va. 353; and in Louisiana, see Wilmot v. The Ouachita Belle, 32 La. Ann. 607.

[2] McDonald v. Eggleston (18—), 26 Vt. 154, 60 Am. Dec. 303; Russell v. Annable (1871), 109 Mass. 72, 12 Am. Rep. 665; Hull v. Young (1889), 30 S. C. 121, 3 L. R. A. 521.

[3] Tischler v. Kurtz (1895), 35 Fla. 323, 17 So. Rep. 661.

[4] Edwards v. Dillon (1893), 147 Ill. 14, 35 N. E. Rep. 135, 37 Am. St. Rep. 199; Hocking v. Hamilton (1893), 158 Pa. St. 107, 27 Atl. Rep. 836; Price v. Alexander (1850), 2 Greene (Iowa), 427, 52 Am. Dec. 526; Skinner v. Dayton (1822), 19 Johns. (N. Y.) 513, 10 Am. Dec. 286.

the business of the firm,[1] or for the hiring of horses necessary for the conduct of the partnership affairs.[2]

§ 182. —— **Insurance.**— One partner has implied power to bind the firm by contracts for the insurance of the partnership property.[3] In case of loss, his power extends to the settlement of the loss with the insurance company.[4] He may also bind the firm by consenting to the cancellation or surrender of a policy.[5]

§ 183. —— **Mortgages and pledges.**— The power of one partner to pledge or mortgage the personal property of the firm to secure money borrowed seems to be co-extensive with the power to borrow. In respect of mortgages and pledges to secure partnership indebtedness, the authorities are not in harmony, but the prevailing rule is that one partner has the implied power to mortgage, certainly part, and usually all, of the property of the firm kept for sale, to secure the payment of the firm debts. As to that not kept for sale, the power to mortgage it all would seem to be subject to the same limitations as the power to assign for the benefit of creditors.[6]

But one partner has, of course, no implied power to pledge or mortgage the partnership property to secure his own pri-

[1] Seaman v. Ascherman (1883), 57 Wis. 547, 15 N. W. Rep. 788; Stillman v. Harvey (1879), 47 Conn. 26; Smith v. Cisson (1867), 1 Colo. 29.

[2] Sweet v. Wood (1893), 18 R. I. 386, 28 Atl. Rep. 335.

[3] Hooper v. Lusby (1814), 4 Camp. 66; Peoria Ins. Co. v. Hall (1864), 12 Mich. 202.

[4] Brown v. Hartford Ins. Co. (1875), 117 Mass. 479.

[5] Hillock v. Traders' Ins. Co. (1884), 54 Mich. 531, 20 N. W. Rep. 571.

[6] See Tapley v. Butterfield (1840), 1 Metc. (Mass.) 515, 35 Am. Dec. 375; Donald v. Hewitt (1859), 33 Ala. 534, 73 Am. Dec. 431; Robards v. Waterman (1893), 96 Mich. 233, 55 N. W. Rep. 662; Hage v. Campbell (1891), 78 Wis. 572, 47 N. W. Rep. 179, 23 Am. St. Rep. 422; Citizens' Nat. Bank v. Johnson (1890), 79 Iowa, 290, 44 N. W. Rep. 551; McCarthy v. Seisler (1891), 130 Ind. 63, 29 N. E. Rep. 407; Phillips v. Furniture Co. (1890), 86 Ga. 699, 13 S. E. Rep. 19; Horton v. Bloedorn (1893), 37 Neb. 666, 56 N. W. Rep. 321; Letts-Fletcher Co. v. McMaster (1891), 83 Iowa, 449, 49 N. W. Rep. 1035.

vate debts, and of this the party taking it presumptively has knowledge.[1]

§ 184. —— **Notice.**— Notice to or knowledge of one partner in relation to partnership matters is, in general, notice to or knowledge of the firm.[2] Although not all of the questions have arisen in partnership cases, the rules applicable in agency would doubtless apply, *i. e.*, that the notice or knowledge must have been acquired in relation to the partnership business and either during the partnership or so soon before its creation that the partner receiving the notice then remembered or must be presumed to have remembered it.[3] The exceptions to the general rule would also doubtless apply here if the partner were really acting adversely or were colluding with the party claiming the benefit of the notice, to defraud the firm.[4]

§ 185. —— **Payments.**— Each partner has implied power to pay the firm debts out of the firm funds; and he may sell or transfer the firm property in payment of firm debts under the same conditions that he might pledge or mortgage it for the purpose of securing their payment.[5] He has no implied authority, of course, to pay his private debt with partnership funds, and cannot transfer partnership property in satisfaction of such a debt.[6]

§ 186. —— **Sales.**— Each partner has implied authority to sell, assign or dispose of, in the regular course of business,

[1] See Oliphant v. Markham (1891), 79 Tex. 543, 15 S. W. Rep. 569, 23 Am. St. Rep. 363.

[2] See Tucker v. Cole (1882), 54 Wis. 539; Holton v. McPike (1881), 27 Kan. 286; Herbert v. Odlin (1860), 40 N. H. 267; Howland v. Davis (1879), 40 Mich. 546.

[3] See Mechem on Agency, §§ 718–723.

[4] See Bignold v. Waterhouse (1813), 1 Maule & Sel. 255; Ex parte Heaton, Buck, 386.

[5] See Ullman v. Myrick (1890), 93 Ala. 532, 8 So. Rep. 410; Johnson v. Robinson (1887), 68 Tex. 399, 4 S. W. Rep. 625; Hanchett v. Gardner (1891), 138 Ill. 571, 28 N. E. Rep. 788.

[6] See Cannon v. Lindsey (1887), 85 Ala. 198, 3 So. Rep. 676, 7 Am. St. Rep. 38; Janney v. Springer (1889), 78 Iowa, 617, 43 N. W. Rep. 461, 16 Am. St. Rep. 460.

so much of the partnership property as is designed for sale, even though it be the whole property of the firm, and may pass the entire title to it. He may also sell or transfer, in the course of the business, choses in action and other intangible property of the firm, such as its accounts and bills receivable, patent-rights, and the like. And upon the sale he may give such warranties of title or quality, or may make such incidental contracts in relation thereto, as are usually made in like cases.[1]

The implied power of one partner to sell the entire property of the firm is, by the weight of authority, limited to that kept for sale, and does not include the power to sell that kept for the purposes of carrying on the business.[2]

§ 187. —— **Suits at law.**— "A partner may sue in the name of himself and copartners without their consent," says Mr. Justice Lindley,[3] "but if he sues against their consent he must indemnify them against the costs. So one partner may defend an action brought against the firm, indemnifying the firm against the consequences of so doing if he acts against the will of the other partners." If the firm is sued, one partner may employ an attorney who may enter the appearance of the firm as such, though probably not of the other partners as individuals.[4]

For trespasses and other similar acts committed by one partner in attempting to enforce partnership demands by legal process, the firm will ordinarily be liable.[5] Even for

[1] See Ellis v. Allen (1886), 80 Ala. 515, 2 So. Rep. 676; Crites v. Wilkinson (1884), 65 Cal. 559, 4 Pac. Rep. 567; First Nat. Bank v. Freeman (1882), 47 Mich. 408; Schneider v. Sansom (1884), 62 Tex. 201.

[2] See Lowman v. Sheets (1890), 124 Ind. 417, 24 N. E. Rep. 351, 7 L. R. A. 784; Wilcox v. Jackson (1884), 7 Colo. 521, 4 Pac. Rep. 966; Cayton v. Hardy (1858), 27 Mo. 536.

[3] 1 Lindley on Partnership (Ewell's 2d Am. ed.), 271. See, also, Kuhn v. Weil (1880), 73 Mo. 213; Ward v. Barber, 1 E. D. Smith (N. Y.), 423.

[4] See Phelps v. Brewer (1852), 9 Cush. (Mass.) 390, 57 Am. Dec. 56; Haslet v. Street (1823), 2 McCord (S. C.), 310, 13 Am. Dec. 724, and note; Hall v. Lanning (1875), 91 U. S. 160, 23 L. ed. 271; Bennett v. Stickney (1845), 17 Vt. 531.

[5] See Harvey v. Adams (1875), 32

the malicious acts of one partner, the others may be liable if they co-operate in them or subsequently ratify them; though one partner is not liable for a malicious prosecution carried on by his partner if he did not know of it or consent to it, and no benefit resulted to the firm.[1]

§ 188. —— **Suretyship and guaranty.**— One partner may bind the firm upon a contract of suretyship or guaranty for the partnership purposes and within the scope of its business;[2] but he has no implied authority to bind the firm by contracts of guaranty or suretyship either for himself individually or for strangers to the firm.[3]

Where the indorsement of the firm name appears as such upon what is clearly the individual note of the partner, it is evidence of itself that the firm name is used for his accommodation, and the firm cannot be held unless it authorized it; but where the instrument does not disclose that it is the individual obligation of one partner, as where the note of the partner is made to the firm and indorsed in its name by that partner for his own benefit, a *bona fide* holder ignorant of the fraud can recover.[4]

§ 189. **Of the powers of a majority.** — The extent to which a majority of the partners may control the partnership affairs is not definitely settled by the authorities. It is clear, however, that a majority cannot, against the dissent of the minority, change the essential nature or extent of the partnership business as originally agreed upon, as to alter

Mich. 472; Rolfe v. Dudley (1885), 58 Mich. 208, 24 N. W. Rep. 657; Kuhn v. Weil, *supra*.

[1] Rosecrans v. Barker (1885), 115 Ill. 331, 56 Am. Rep. 169.

[2] See First National Bank v. Carpenter (1875), 41 Iowa, 518; Jordan v. Miller (1881), 75 Va. 442; Wilkins v. Pearce (1848), 5 Denio (N. Y.), 541.

[3] See Clarke v. Wallace (1891), 1 N. D. 404, 48 N. W. Rep. 339, 26 Am. St. Rep. 636; Andrews v. Planters' Bank (1846), 7 Smedes & Mar. (Miss.) 192, 45 Am. Dec. 300; New York, etc. Ins. Co. v. Bennett (1825), 5 Conn. 574, 13 Am. Dec. 109, and note.

[4] See Redlon v. Churchill (1882), 73 Me. 146, 40 Am. Rep. 345; Sherwood v. Snow (1877), 46 Iowa, 481, 26 Am. Rep. 155; Atlas Nat. Bank v. Savery (1879), 127 Mass. 75.

or amend the articles, reduce or increase the capital, embark upon a new business, change its location, alter the share of a partner, admit a new member, and the like. If they do, the dissenting partners may withdraw from the firm.[1]

But as to matters pertaining merely to the manner of conducting the business, and all questions concerning the internal affairs of the partnership, it is equally clear that, if the articles do not determine them, the partners themselves must decide, and here the majority will prevail. While one of two partners cannot, therefore, prevail against the expressed dissent of his partner, inasmuch as each has an equal voice, it is held that a majority, where there are more than two, can prevail as to these incidental matters, even against the dissent of the minority.[2]

§ 190. Ratification of unauthorized acts. — The acts of one partner which may bind the firm may be not only those which have been previously and expressly authorized, or which are implied from the mere existence of the relation, but may also be those which, though unauthorized when done, have subsequently been ratified by the other partners. Liability may thus be imposed either in contract or in tort. The occasions and conditions of ratification in these cases are the same as in any other case of agency — the firm or the other partners being principal, and the partner acting being agent,— and as the reader is assumed to be familiar with this subject from his previous study of agency, no discussion of it will be attempted here.[3]

[1] See Const v. Harris (1824), Turn. & R. 517; Abbott v. Johnson (1855), 32 N. H. 9; Zabriskie v. Railroad Co. (1867), 18 N. J. Eq. 178, 90 Am. Dec. 617.

[2] See Johnston v. Dutton (1855), 27 Ala. 245; Staples v. Sprague (1883), 75 Me. 458; Clarke v. Railroad Co. (1890), 136 Pa. St. 408, 20 Atl. Rep. 562; *ante*, § 163.

[3] See Mechem on Agency, §§ 109-182.

CHAPTER X.

WHO ARE BOUND BY THE ACTS OF A PARTNER.

§ 191. **In general.**— The question, who are bound by the acts of a partner, presents several different aspects. It is the question of the rights and remedies of third persons based upon the act of one or more partners. It may arise under varying circumstances, as, for example, where one partner has assumed to bind the firm, but it is claimed that his act was unauthorized; where he apparently acts for himself alone, but it is claimed that the firm was the real party; where certain persons were ostensibly the only partners, but it is claimed that others were also actually in the firm; where the act was the making of a contract; where it was the commission of a tort, and the like. The most appropriate classi-

fication of the subject for our purpose is probably that used in Agency, namely, the liability — 1. In contract. 2. In tort.

I. In Contract.

§ 192. All partners bound by authorized contracts.— It has been seen in an earlier chapter that each partner is the agent of the firm with powers conferred, either expressly or impliedly, to bind the firm as its agent. It follows, therefore, that whenever a partner makes a contract for the firm, and in its name, within the limit of his express or implied authority as a partner, he binds the firm and all members of it. It is immaterial, in this connection, whether the other partners knew of the act or not; or, in the case of implied powers, whether they had previously consented to it or not; or whether it was, or was not, a violation of their agreement between themselves. The only question, so far as the liability of the firm to the third person is concerned, is whether the contract was, in contemplation of law, within the power of the partner; if it was, then every partner is bound by it.[1]

§ 193. Dormant, secret and nominal partners bound also.— This liability involves every one who was, at the time of the contract, either actually or nominally a partner in the firm. The nominal partner is, of course, liable, having been held out as a partner; and if one were then actually a partner he is likewise liable though the other party did not then know of it, or though such partner has since retired from the firm. A secret or dormant partner is therefore liable, when discovered, upon firm contracts, to the same extent as though he had been an ostensible partner. The fact that the other party dealt with the ostensible partner or partners, and gave credit to them in ignorance of the existence of the secret or dormant partner, is not an election to hold the

[1] See Sweet v. Wood (1893), 18 R. I. 386, 28 Atl. Rep. 335; Farmers' Ins. Co. v. Malone (1895), 45 Neb. 302, 63 N. W. Rep. 802.

ostensible partners only, when the dormant or secret partners are afterwards discovered. And the dormant or secret partners are bound not only by those acts which were actually authorized, but also, like other partners, by those acts which were apparently authorized, or were within the scope of the business as actually carried on.[1]

Dormant and secret partners will also be bound by the acts of the ostensible partners, even in those cases where the consent of all partners is necessary, if the other party was ignorant of their existence and acted in good faith.[2]

§ 194. Liability of the firm upon contracts made by one partner in his own name.— As has been seen, when a firm name has been adopted, it ought always to be used in partnership transactions; but, through inadvertence or error, contracts may be made in the individual name of one partner which were designed by one or both parties to be the contracts of the firm. The question, therefore, arises, when may a contract in the name of one partner be shown to be the contract of the firm? The solution of this question is affected both by the nature of the transaction and by the intention of the parties. Thus:

1. The contract may be, (*a*) a simple contract not negotiable, (*b*) a negotiable instrument, or (*c*) a contract under seal.

2. The existence of the partnership may, at the time of making the contract, have been (*a*) known, or (*b*) unknown by the other party.

3. The parties, or one of them, may have intended to

[1] See Winship v. United States Bank (1831), 5 Peters (U. S.), 529; Brooke v. Washington (1852), 8 Gratt. (Va.) 248, 56 Am. Dec. 142, and note; Richardson v. Farmer (1865), 36 Mo. 35, 88 Am. Dec. 129; Gavin v. Walker (1885), 14 Lea (Tenn.), 643; Callender v. Robinson (1880), 96 Pa. St. 454; Pitkin v. Benfer (1892), 50 Kan. 108, 31 Pac. Rep. 695, 34 Am. St. Rep. 110; Bromley v. Elliott (1859), 38 N. H. 287, 75 Am. Dec. 182.

[2] See Locke v. Lewis (1878), 124 Mass. 1, 26 Am. Rep. 631; Reid v. Hollinshead (1825), 4 B. & Cress. 867, Ames' Cas. on Partn. 29.

bind (*a*) the individual partner, or (*b*) the firm. The two latter groups are subsidiary, and may be considered under the first.

§ 195. Same subject — Known partnership — Simple contracts in name of one partner.— Where a person acts as partner for a known firm, the presumption is that he intended to bind the firm and not himself, and where such was the intention the firm and not the partner is bound. This presumption, however, may be rebutted, and if it appears that the other party has knowingly dealt with the partner as an individual, and that the latter has pledged his individual credit, the partner alone will be bound and not the firm. And if the transaction were really an individual one, the firm does not become liable because it afterwards received the benefit of the transaction. Thus, if money were loaned or goods sold to one partner as an individual, the firm does not become liable to the lender or the seller simply because the money or the goods came to the use of the firm. The liability of the firm is to the partner upon whose credit the money or goods were obtained, and that partner must answer to those from whom they were obtained. Whether the credit was extended to the firm as such, or to the partner individually, is a question to be determined in view of all of the facts and circumstances of the case.[1]

Where, however, the goods or money are applied to the benefit of the firm, the firm may adopt the transaction, and

[1] See Tyler v. Waddingham (1890), 58 Conn. 375, 8 L. R. A. 657; Peterson v. Roach (1877), 32 Ohio St. 374, 30 Am. Rep. 607; Adams v. Hardware Co. (1887), 78 Ga. 485; Thornton v. Lambeth (1889), 103 N. C. 86; First National Bank v. Cringan (1895), — Va. —, 21 S. E. Rep. 820; Brown v. Fresno Raisin Co. (1894), 101 Cal. 222, 35 Pac. Rep. 639. The firm is not liable upon a note given by one partner for his share of the capital. First National Bank v. Cringan, *supra*. So where one partner borrows money on his own note to reimburse another partner for money advanced to the firm, the firm is not liable. Redenbaugh v. Kelton (1895), — Mo. —, 32 S. W. Rep. 67.

the benefit received will be a sufficient consideration to support a promise by the firm to pay the debt.[1]

§ **196. —— Note of one partner.**— Similar questions arise where a creditor takes the obligation of one partner for a partnership debt.

If, at the time the debt is contracted, the note or other obligation of one partner is taken, and credit given exclusively to him, the firm will not be bound; but if credit were given to the firm, the note or other obligation will be deemed to have been taken as collateral security or otherwise, and the firm will still be bound, not upon the note but upon the original consideration. To whom the credit was given is here, as in the preceding section, a question of fact to be determined in view of all the circumstances.[2] And even though the note were originally the obligation of one partner only, still if it was really made upon the firm account, the firm may adopt the debt and become liable to pay it.[3]

If the obligation of one partner, *e. g.*, his promissory note, be taken for a previously created debt, the effect depends upon the intention. Such a note may be taken as payment

[1] See Seigel v. Chidsey (1857), 28 Pa. St. 279, 70 Am. Dec. 124.

[2] See Hoeflinger v. Wells (1879), 47 Wis. 628; North Penn. Coal Co.'s Appeal (1863), 45 Pa. St. 181, 84 Am. Dec. 487; Maffet v. Leuckel (1880), 93 Pa. St. 468; Smith v. Collins (1874), 115 Mass. 388. In Hoeflinger v. Wells, *supra*, where the question was whether plaintiff could recover of the firm of Stafford & Wells for money loaned upon Stafford's note, the court says: "If upon the trial the plaintiff can show that the money was borrowed for the firm, that he was at the time advised that it was for the firm, and that he loaned it to the firm and upon its credit, then the mere taking of the individual note of the one partner for the money so loaned will not defeat the action. The taking of such note may be evidence tending to show that the money was not loaned to the firm, and that the sole credit was given to Stafford; but it is not conclusive of that fact; and if the jury or the court should find as a fact that the money was borrowed by and loaned to the firm and upon its credit, then the taking of the individual note of one member of the firm would not be a payment of such firm debt, unless it was affirmatively shown that such note was taken in payment of the same."

[3] See Siegel v. Chidsey (1857), 28 Pa. St. 279, 70 Am. Dec. 124.

of the firm debt, and if it is so taken the firm debt is gone; but in order to discharge the firm the evidence must be clear that it was so taken in satisfaction, for this will not be presumed from the mere fact of the taking, and in the absence of such evidence the firm will still be bound upon the debt.[1]

§ 197. **Same subject — Unknown partnership.**— In those cases in which it is held that the creditor has recourse against one partner only, it is because it is determined that the creditor has elected to give credit to such partner alone. But an election involves the opportunity of choice — of choosing between the credit of the firm and that of the individual partner,— and this opportunity of choice can only exist where the creditor knew that there was a partnership at the time that he gave credit. If he did not then know of the existence of the partnership, it is obvious that a different question is presented, but it is, at the same time, a question with which we have already had to deal. It is another phase of the liability of an undisclosed principal — the partnership — for the acts and contracts of his agent — the partner. As to this, we have found that an undisclosed principal when discovered is, in general, bound by the simple contracts of his agent, although at the time the other party gave credit to the agent alone, supposing him to be the principal. Two exceptions to this rule were found to prevail: 1. That the principal cannot be held where he had been previously led by the creditor's conduct to settle with the agent upon the assumption that the agent had paid such creditor; and 2. That the principal cannot be held where, after his discovery, the creditor has elected to give credit to the agent alone.[2] This rule applies in the case of partnerships, and subject to the exceptions named, the undisclosed partners are liable, when discovered, upon the simple contracts made

[1] See Luddington v. Bell (1879), 77 N. Y. 138, 33 Am. Rep. 601; Crooker v. Crooker (1863), 52 Me. 267, 83 Am. Dec. 509.

[2] See Mechem on Agency, §§ 695–698.

really in behalf of the firm though ostensibly by one partner only.[1] This power of the creditor to hold the undisclosed or dormant partners liable confers a right but does not impose a duty; that is, the creditor has usually his option to sue all or only the one with whom he dealt — he *may* sue all, but is not *obliged* to do so.[2]

§ 198. Same subject — Contracts under seal.— In the case of instruments under seal, different rules apply for technical reasons. Upon such an instrument, where the common-law incidents of a seal still exist, only those persons who are named as parties to it can sue or be sued; and hence if one partner gives his own sealed obligation, or enters into a contract under seal, the firm cannot be held, either upon the instrument itself or upon the consideration, by showing the contract was really made in behalf of the firm or that it received the benefit of it.[3]

§ 199. Same subject — Judgment against one partner. A judgment against one partner for a partnership debt discharges the other partners whether ostensible or secret. The judgment is a higher security which merges the lower; and, besides, the liability of the partners is a joint one, upon which they cannot be separately sued.[4]

§ 200. Contracts made in individual names of all the partners.— Where a firm name has been adopted, it should be used in partnership transactions, and, as a rule, the firm cannot be bound as such by any other name. But this rule is not inflexible, and between themselves partners may adopt such names as they please. They may also do this as tc

[1] See Beckham v. Drake, 9 Mees. & Wels. 79; Reynolds v. Cleveland (1825), 4 Cowen (N. Y.), 282, 15 Am. Dec. 369; Griffith v. Buffum (1850), 22 Vt. 181, 54 Am. Dec. 64.

[2] Cleveland v. Woodward (1843), 15 Vt. 302, 40 Am. Dec. 682.

[3] See Tom v. Goodrich, 2 Johns. (N. Y.) 214; United States v. Astley, 3 Wash. (U. S. C. C.) 512; North Penn. Coal Co.'s Appeal (1863), 45 Pa. St. 181, 84 Am. Dec. 487.

[4] See Smith v. Black (1822), 9 Serg. & R. (Pa.) 142, 11 Am. Dec 686; Wann v. McNulty (1845), 7 Ill. 355, 43 Am. Dec. 58; Suydam v. Barber (1858), 18 N. Y. 468, 75 Am. Dec. 254. See, also, *post*, §§ 210, 211.

creditors if the transaction is really a partnership transaction and for its benefit. Thus, though an obligation signed, not in the firm name, but in the individual names of all of the partners, is *prima facie* an individual transaction and not a partnership one, it may be shown to be a partnership transaction not only between the partners themselves, but also in favor of the obligee and against other creditors of the firm.[1]

§ 201. Contracts where firm does business in name of one partner.— It is not uncommon, as has been seen, for a firm to do business in the name of a single partner, and contracts made in that name for the firm will bind all members.[2] If that partner carries on no individual business separate from that of the firm, contracts made in such name will be presumed to bind the firm; if he does carry on a separate business, no such presumption arises, and the person who would charge the firm upon a contract made in the name of such partner must show that it was intended to bind the firm.[3]

§ 202. Contracts where there are two firms of same name with common partner.— Cases occur, though they are comparatively rare, where two firms are doing business under the same name in the same locality, and having one or more but not all of their members in common. It was thought at one time that where a contract was made in such firm name by the common partner, and the other party did not know for which of the firms he assumed to act, either firm could be held at the option of the other party, but that both could not be held. The true rule seems to be, however,

[1] See Berkshire Woolen Co. v. Juillard (1879), 75 N. Y. 535, 31 Am. Rep. 488; Mix v. Shattuck (1878), 50 Vt. 421, 28 Am. Rep. 511; Freeman v. Campbell (1880), 55 Cal. 197; Iddings v. Pierson (1884), 100 Ind. 418; Warriner v. Mitchell (1889), 128 Pa. St. 153.

[2] See Rumsey v. Briggs (1893), 139 N. Y. 323, 34 N. E. Rep. 929.

[3] See United States Bank v. Binney (1828), 5 Mason (U. S. C. C.), 189; Yorkshire Banking Co. v. Beatson (1880), L. R. 5 C. P. Div. 109; Bank of Rochester v. Monteath (1845), 1 Denio (N. Y.), 402, 43 Am. Dec. 681.

that such cases stand upon no peculiar ground, but that that firm only is to be held which by the facts and circumstances is pointed out as the one for which the partner acted.[1]

§ 203. Liability where the partner exceeds his authority.— A partner, like other agents, may incur individual liability by assuming to act without sufficient authority. In such cases he may make express representations as to his authority, and he may likewise make an implied representation by assuming to act as a partner. For a breach of either of these representations he may be held liable to third persons who are injured by reason of his undertaking to bind the firm when he had no authority so to do. Whether he can be held upon the very contract which he has made without authority, depends upon whether the contract contains apt words to charge him personally. His liability in these cases depends ordinarily upon the familiar rules which make an agent liable who has exceeded his authority or who has assumed to act for a principal having no legal existence.[2]

II. In Tort.

§ 204. Firm liable for torts of one partner committed in course of business.— The liability of the firm for the torts of one partner rests upon the same foundation as the

[1] See Hastings National Bank v. Hibbard (1882), 48 Mich. 452, 12 N. W. Rep. 651; Swan v. Steele (1806), 7 East, 210. In Hastings National Bank v. Hibbard, *supra*, it appeared that a firm of three partners, engaged in operating a particular flouring mill, temporarily arranged to take in another partner and run an additional mill as another firm. Both firms, however, had the same name and used the same letterheads, upon which the names of all four partners were printed, but the business of the two mills was kept distinct. The second mill kept no bank account, but borrowed from the first when necessary, and kept its account with it. One of the original partners made a note in the firm name and discounted it at the plaintiff's bank. In an action by the bank the jury found that the bank relied exclusively upon the credit of the original partners. It was not claimed that the money was borrowed or used for the benefit of the later firm. It was therefore held that the additional partner could not be held liable.

[2] See Mechem on Agency, §§ 541, 557; Taft v. Church (1895), 162 Mass.

liability of a principal for the torts of his agent, which has been already considered. Thus, the firm is liable in a civil action for the negligence of one partner, committed in the transaction of partnership business; as, for example, where one of a firm of lawyers or physicians causes loss to a client or a patient by a want of professional skill or a failure to use due care or diligence.[1]

This liability of the firm is not, however, confined to actions based upon a partner's negligence; it is liable also for his trespass, fraud, deceit, misrepresentation or malice, if committed in the scope of the partnership business and in furtherance of its interests; as, for example, where one partner in the prosecution of the firm business wrongfully seizes the property of a third person, or institutes malicious prosecutions, or is guilty of a libel.[2] A greater liability still may also be incurred by a previous authorization or a subsequent ratification.

§ 205. Liability of firm for partner's malicious or criminal act.— But the firm would not be liable, unless previously authorized or subsequently ratified, for similar acts committed by the partner outside of the partnership business and

527, 39 N. E. Rep. 283; North Star Co. v. Stebbins (1893), 3 So. Dak. 540, 54 N. W. Rep. 593.

[1] See Hess v. Lowrey (1889), 122 Ind. 225, 23 N. E. Rep. 156, 17 Am. St. Rep. 355; Hyrne v. Erwin (1885), 23 S. C. 226, 55 Am. Rep. 15; Collier v. McCall (1887), 84 Ala. 190, 4 So. Rep. 367; Haley v. Case (1886), 142 Mass. 316, 7 N. E. Rep. 877; Bucki v. Cone (1889), 25 Fla. 1, 6 So. Rep. 160.

[2] See Strang v. Bradner (1884), 114 U. S. 555, 29 L. ed. 248; Stanhope v. Swafford (1890), 80 Iowa, 45, 45 N. W. Rep. 403; Morehouse v. Northrop (1866), 33 Conn. 380, 89 Am. Dec. 211; Locke v. Stearns (1840), 1 Metc. (Mass.) 560, 35 Am. Dec. 382; Chester v. Dickerson (1873), 54 N. Y. 1, 13 Am. Rep. 550; Jacobs v. Shorey (1868), 48 N. H. 100, 97 Am. Dec. 586; Brundage v. Mellon (1895), — N. Dak. —, 63 N. W. Rep. 209; Haney Mfg. Co. v. Perkins (1889), 78 Mich. 1, 43 N. W. Rep. 1073; Lathrop v. Adams (1882), 133 Mass. 471, 43 Am. Rep. 528. The individual property of an innocent partner is not liable to attachment for a firm debt fraudulently contracted by a copartner. Jaffrey v. Jennings (1894), 101 Mich. 515, 25 L. R. A. 645.

for his own purposes, as where he acts from his own private malice or ill-will.[1]

Neither can one partner, not personally in fault, ordinarily be held liable in a criminal or penal action for the acts of his partner.[2]

§ 206. Liability of firm for partner's breach of trust.— Breaches of trust or misappropriation by one partner in respect of funds or property which come into the possession of the firm in the course of its business will make the firm responsible;[3] but the firm will not be responsible, as for breach of trust, because one partner wrongfully employs in the partnership business funds of which he alone was trustee, if his partners were ignorant of the source of the money or of his want of title to it, though they would be liable if they had such knowledge.[4]

[1] See Rosekrans v. Barker (1885), 115 Ill. 331, 56 Am. Rep. 169.

[2] See Watson v. Hinchman (1879), 42 Mich. 27, 3 N. W. Rep. 236; McNeely v. Haynes (1877), 76 N. C. 122.

[3] See Todd v. Jackson (1881), 75 Ind. 272.

[4] See Englar v. Offutt (1889), 70 Md. 78, 14 Am. St. Rep. 332; Guillou v. Peterson (1879), 89 Pa. St. 163; Gilruth v. Decell (1894), 72 Miss. 232, 16 So. Rep. 250.

CHAPTER XI

OF THE LIABILITY OF THE FIRM FOR THE ACTS OF ITS AGENTS AND SERVANTS

§ 207. Firm liable like other principals for acts of its servant and agents.

§ 207. Firm liable like other principals for the acts of its servants and agents.— It seems desirable to call attention — not for the purpose of discussion but that it may not be overlooked — to the liability of the firm for the acts of its ordinary servants and agents. The discussion of the preceding chapter was devoted to the acts of the partner as agent of the firm, but the firm may, as has been seen, employ all the agents and servants, who are not partners, that the business may demand. For the acts of these agents and servants, whether in contract or in tort, the firm is liable in the same cases and upon the same conditions as any other principal or master.

The discussion of this liability belongs, therefore, to treatises upon the law of agency and master and servant; with the former of which, at least, it is assumed that the student is already familiar.

CHAPTER XII.

OF THE NATURE AND EXTENT OF THE LIABILITY OF PARTNERS.

§ 208. **In general.**— The question of the liability of partners involves both the nature of that liability and its extent. These subjects, therefore, will be separately considered.

I. OF THE NATURE OF PARTNERSHIP OBLIGATIONS.

§ 209. **Partnership obligations when arising on contract are joint.**— The obligation of those contracts which are binding upon the firm is the joint obligation of all the partners and not the several obligation of any of them. One partner may, as has been seen, bind himself only; but if he binds the firm, he binds all members of it jointly and not severally.

It is sometimes said that, while partnership contracts are

thus joint at law, they are joint and several in equity; but this seems to be true as respects the remedy only.[1]

§ 210. **Same subject — Judgment against one partner releases others.**— The obligation of firm contracts being joint, if the creditor proceeds to judgment against one of them alone he releases the others.[2] In a leading case[3] in the supreme court of the United States, where a creditor who had taken judgment against one partner upon a firm note in one state sought to recover against another partner in another state, the court, through Mr. Justice Field, said: "It is true that each copartner is bound for the entire amount due on copartnership contracts; and that this obligation is so far several that if he is sued alone, and does not plead the non-joinder of his copartners, a recovery may be had against him for the whole amount due upon the contract, and a joint judgment against the copartners may be enforced against the property of each. But this is a different thing from the liability which arises from a joint and several contract. There the contract contains distinct engagements — that of each contractor individually, and that of all jointly,— and different remedies may be pursued upon each. The contractors may be sued separately on their several engagements or together on their joint undertaking. But in copartnerships there is no such several liability of the copartners. The copartnerships are formed for joint purposes. The members undertake joint enterprises, they assume joint risks, and they incur in all cases joint liabilities. In all copartnership transactions this common risk and liability exist. Therefore it is that in suits upon these transactions all the copartners must be brought in, except where there is some ground of personal release from liability, as infancy, or a discharge in bankruptcy; and if not brought in, the omission may be pleaded in abatement. The

[1] See *post*, § 270. And see the opinions in Kendall v. Hamilton (1879), 4 App. Cas. 504.

[2] See Kendall v. Hamilton (1879), L. R. 4 App. Cas. 504.

[3] Mason v. Eldred (1867), 6 Wall. (U. S.) 231, Paige's Partn. Cas. 151.

plea in abatement avers that the alleged promises, upon which the action is brought, were made jointly with another and not with the defendant alone — a plea which would be without meaning if the copartnership contract was the several contract of each copartner."

§ 211. **Same subject.**— "The general doctrine maintained in England and the United States," continued the same learned judge, "may be briefly stated. A judgment against one, upon a joint contract of several persons, bars an action against the others, though the latter were dormant partners of the defendant in the original action and the fact was unknown to the plaintiff when that action was commenced. When the contract is joint, and not joint and several, the entire cause of action is merged in the judgment. The joint liability of the parties not sued with those against whom the judgment is recovered being extinguished, their entire liability is gone. They cannot be sued separately, for they have incurred no several obligation; they cannot be sued jointly with the others, because judgment has been already recovered against the latter, who would otherwise be subjected to two suits for the same cause."

This rule, however, may be changed by statute where part of the defendants in the first action who are sought to be held liable in the second were not personally served with process.[1]

§ 212. **Same subject — Release of one releases all.**— Another consequence of the joint character of partnership obligations is the rule that a release of one of the partners releases all.[2] This rule applies, however, only to the case of a technical release under seal, and does not extend to a mere covenant not to sue one partner, or to any other instrument

[1] Mason v. Eldred, *supra*.

[2] 1 Lindley on Partnership (Ewell's ed.), 287. Thus a receipt under seal, given to one of two or more joint debtors, "in full satisfaction for his liability" upon the obligation, imports a technical release, and therefore releases all. Hale v. Spaulding (1888), 145 Mass. 482, 14 N. E. Rep. 534, 1 Am. St. Rep. 475.

reserving the creditor's rights against the other partners, which, though in the form of a release, may be treated as a covenant not to sue rather than as an absolute release.[1]

§ 213. Partnership obligations arising from tort are joint and several.— The liability, however, of partners for torts committed by one partner or by the servant of the firm is joint and several, and the action may be brought against one or all or an intermediate number.[2]

"To this general rule," says Mr. Justice Lindley,[3] "an exception occurs where an action *ex delicto* is brought against several persons in respect of their ownership in land, for then they are liable jointly, and not jointly and severally."

II. OF THE EXTENT OF PARTNERSHIP LIABILITY.

§ 214. Each partner liable in solido for partnership obligations.— Although the obligation of partnership liabilities may be in nature joint, it does not follow that the liability when established is to be jointly or ratably enforced against the partners. The liability may be *joint*, but it is also *entire*. Each partner, therefore, is personally and individually liable for the entire amount of all such obligations, whether arising from contract or tort, as are binding upon the firm. His liability, in ordinary partnerships, is not limited by the amount of his contribution to the partnership capital, but extends to his entire property; and it makes no difference what may be his share or interest in the partnership business, or whether he is an active or a secret partner, or whether the other partners are responsible or not; he is liable *in solido* for the partnership obligations.

[1] Lindley, *ubi supra;* Hale v. Spaulding, *supra;* Benjamin v. McConnell (1847), 4 Gilm. (Ill.) 536, 46 Am. Dec. 474; Berry v. Gillis (1845), 17 N. H. 9, 43 Am. Dec. 584.

[2] See White v. Smith (1860), 12 Rich. (S. C.) L. 595; Howe v. Shaw (1868), 56 Me. 291; Roberts v. Johnson (1874), 58 N. Y. 613.

[3] 1 Lindley on Partnership (Ewell's ed.), 198, citing 1 Wms. Saunds. 291, *f* and *g*.

§ 215. Individual property of partner may be taken to satisfy partnership debt.— Moreover, if judgment be obtained against the firm upon an obligation existing against it, the execution, though in form against all, may, unless otherwise provided by statute, be levied directly upon the individual property of any one or more of the partners without regarding or exhausting the firm property. The creditor, further, is under no obligation to levy against all the partners ratably, but may select any one or more and levy execution against him or them until the judgment is satisfied, leaving all questions of contribution to be settled afterwards between the partners themselves.[1] In case any partner is not served with process, no personal judgment can ordinarily be rendered against him, nor can his individual property usually be taken, though the firm property may be seized.

If conflict arises between the firm creditors and the individual creditors of the partner, as to the application of the individual property of a partner, special rules apply which will be hereafter considered.[2]

§ 216. Partner paying debt may have contribution.— Where one partner is thus compelled to pay or satisfy the whole of a partnership debt, he has a remedy, usually upon an accounting in equity,[3] to require the other partners to contribute their *pro rata* shares. For though each partner as to third persons is liable for all the partnership debts, yet as between themselves each partner is liable only for his own share. And even as to third persons, though each is liable for all the debts of the firm, yet his liability is said to be as a principal debtor for his own share, and as surety for the other partners for the remainder.

[1] See Randolph v. Daly (1863), 16 N. J. Eq. 313; Clayton v. May (1881), 68 Ga. 27; Stout v. Baker (1884), 32 Kan. 113. But in Jaffray v. Jennings (1894), 101 Mich. 515, 25 L. R. A. 645, it is held that the individual property of an innocent partner is not liable to attachment for a firm debt fraudulently contracted by another member of the firm.

[2] See *post*, ch. XIX.

[3] See *ante*, § 127.

§ 217. Exemptions from execution on partnership property.— The present seems an appropriate place to mention the question of the right of the firm or of one partner to claim the statutory exemptions from execution against the partnership property. The authorities are very much in conflict, but the clear weight of authority is to the effect that, during the continuance of the partnership, neither the firm nor one partner can claim such exemptions.[1] In Michigan, Georgia, North Carolina and New York, the rule is otherwise.[2]

III. Of the Beginning and Ending of Liability.

§ 218. In general.— The liability of the partner is based upon the theory that he was a principal in the business in which the obligation was incurred. It often becomes material, therefore, to determine when he became or ceased to be a partner, and whether he was such at the time the disputed liability arose. He may contend that the obligation was incurred before he became a partner; or that it arose after he had ceased to be such. Where the question is whether any partnership at all had then been organized, the question will be governed by principles already referred to. If the question is whether all partnerhip relations have ceased, considerations hereafter to be mentioned will control. But a person may be admitted as a partner to a firm already existing, or he may retire from a firm which thereafter continues business, and his liability in either case requires some special consideration.

[1] See Cowan v. Creditors (1888), 77 Cal. 403, 11 Am. St. Rep. 294, and cases cited; Thurlow v. Warren (1889), 82 Me. 164, 17 Am. St. Rep. 472; Aiken v. Steiner (1892)), 98 Ala. 355, 39 Am. St. Rep. 58; Pond v. Kimball (1869), 101 Mass. 105; Prosser v. Hartley (1886), 35 Minn. 340, 29 N. W. Rep. 156.

[2] See McCoy v. Brennan (1886), 61 Mich. 362, 1 Am. St. Rep. 589; Blanchard v. Pascal (1881), 68 Ga. 32, 45 Am. Rep. 474; Evans v. Bryan (1886), 95 N. C. 174, 59 Am. Rep. 233; Stewart v. Brown (1867), 37 N. Y. 350, 93 Am. Dec. 578.

§ 219. Of an incoming partner.— A person who enters a previously existing firm is often called an incoming partner. The admission of a new partner really constitutes in law a dissolution of the old and the creation of a new partnership, though in actual practice it is often not so regarded, the firm by consent being treated as continuing, notwithstanding the change in membership.

An incoming partner is not liable for the previously contracted obligations of the firm to which he is thus admitted, unless by special agreement he has assumed such a liability, or has so conducted himself as to raise a presumption of such an agreement. He acquires also no greater interest in the property of the former partnership than the agreement which provides for his admission may confer upon him.[1]

§ 220. Of an outgoing partner.— A person who retires from a firm which thereafter continues is said to be an outgoing partner. His withdrawal is, of course, in law a dissolution of the firm,— though in practice the firm is frequently spoken of as continuing,— and his further liability is governed by the general rules governing dissolution. He is therefore, as will be seen,[2] in general liable for acts done until he has not only withdrawn from the firm but has also given due notice of his withdrawal.[3]

[1] See Hatchett v. Blanton (1882), 72 Ala. 423; Ringo v. Wing (1887), 49 Ark. 457; Bracken v. Dillon (1879), 64 Ga. 243; Love v. Payne (1880), 73 Ind. 80, 38 Am. Rep. 111.

[2] See *post*, § 266.

[3] See *post*, §§ 258-265.

CHAPTER XIII.

OF ACTIONS BY AND AGAINST THE FIRM.

§ 221. In general.— The question of actions by the firm involves somewhat different considerations from those raised when the action is against the firm. Each subject will therefore be separately considered. What is here said has reference to actions brought during the continuance of the firm. The rules applicable where the partnership is dissolved by death or otherwise will be considered later when dealing with the effect of dissolution.[1]

I. Actions by the Firm.

§ 222. Who should sue in actions by the firm.— The question who should join as parties plaintiff may arise when the action is (1) in contract, or (2) in tort. In the former

[1] See *post*, § 268 *et seq.*

case the contract may have been made (*a*) in the name of the firm, or (*b*) in the name of one partner for the benefit of the firm.

1. *In Contract.*

§ 223. *a.* **Contracts made in firm name.**— In actions upon contracts made in the name of the firm, the action should be brought in the individual names of all the persons who were the actual and ostensible partners at the time the debt or contract sued upon was made or incurred. If some of those partners have since retired from the firm, the action must still be in the names of those who were the partners at the time, and cannot be maintained in the names of the present partners, except in those cases in which the outgoing partners have assigned their interests to the incoming partners, and the statutes permit such assignees to sue in their own names, or in which there has been a promise to pay to the new firm.

If one has been admitted as a partner who was not such at the time the contract was made, he cannot join in the action, although it were agreed as between the partners themselves that he should become equally interested with the others in all the existing property and rights of the firm; unless, after the accession of the incoming partner, there has been a new and binding promise to pay the firm as newly constituted. Dormant partners are admissible but not indispensable parties. Nominal partners need not be joined unless they have been expressly named in the contract.[1]

§ 224. *b.* **Contracts made in name of one partner for the firm.**— Where the contract was made in the name of one partner but for the benefit of the firm, the action should usually be brought, on simple contracts, in the name of all the partners who constituted the firm at the time the con-

[1] See Fireman's Ins. Co. v. Floss (1887), 67 Md. 403, 10 Atl. Rep. 139, 1 Am. St. Rep. 398; Wood v. O'Kelly (1851), 8 Cush. (Mass.) 406; Hilliker v. Loop (1833), 5 Vt. 116, 26 Am. Dec. 286; Monroe v. Ezzel (1847), 11 Ala. 603; Seymour v. Railroad Co. (1882), 106 U. S. 320.

tract was made, though, where the contract is expressly made with one partner, he alone might sue upon it; on contracts under seal the action must be brought in the name of the partner who made it.[1]

Where the firm sues on a contract made by one partner who did not disclose the existence of the firm, the defendant may usually avail himself of any defenses which might have been open to him if the partner had sued in his own name.[2]

§ 225. Actions cannot usually be brought in firm name.— As has already been noticed, actions cannot be brought by the firm in the firm name unless by virtue of a statute authorizing it. In the absence of such a statute, partners sue collectively, but as individuals. In their process and pleading it is proper, though not usually necessary, to allege that they are partners and constitute the firm named.

In many states, however, there are now statutes authorizing suits in the firm name, either generally or where the individual names are not known at the time the action is commenced.

2. *In Tort.*

§ 226. All partners must sue for torts affecting firm.— In actions for torts committed against the firm as such, such as trespass to its property, injury to its business, libels upon it, and the like, all of the partners must join as plaintiffs. One partner, therefore, cannot maintain an action to recover damages for an injury to firm property.[3] There can be no recovery, however, in the action by the firm, for injuries which affect the partners personally. Thus, for example, when suing for a libel upon the firm, the injury to the firm business is only to be recovered for in the firm's action, and not the injury to the feelings of the partners personally;

[1] See Metcalfe v. Rycroft (1817), 6 Maule & Sel. 75; Scott v. Goodwin (1797), 1 Bos. & Pul. 67; State v. Merritt (1879), 70 Mo. 275.

[2] See Gilbert v. Lichtenberg (1894), 98 Mich. 417.

[3] See Sindelare v. Walker (1891), 137 Ill. 43, 27 N. E. Rep. 59, 31 Am. St. Rep. 353. See, also, White v. Campbell (1893), 18 R. I. 150; Bigelow v. Reynolds (1888), 68 Mich. 344, 36 N. W. Rep. 95.

and when suing for the wrongful seizure of property, the seizure of the individual property of one partner is not to be considered.[1]

II. Actions against the Firm.

§ 227. Who should be sued in actions against the firm. The question, who are proper parties defendant in actions against the firm, presents substantially the same considerations as the question who should be plaintiffs.

1. *In Contract.*

§ 228. All actual and ostensible partners should be joined.— The contract obligations of the firm being joint, all of the actual and ostensible partners who were such at the date of the contract must, as a rule, be joined as parties defendant in actions of contract. This rule, however, has been changed in several states by statutes which make joint debts joint and several at the option of the obligee.[2]

The fact that one who was a partner when the contract was made has since retired will not relieve him from liability; neither can one who was not then a partner, but has since come in, be held liable unless by novation or otherwise he has assumed liability.[3]

§ 229. Dormant and secret partners proper but not necessary parties.— Dormant and secret partners are proper but not necessary parties. If the contract were made by one partner in his own name, but really for the firm, that partner or all of the partners may be sued, if it were a simple contract; but if it were a specialty, the partner named in it can alone be sued.[4]

[1] Watts v. Rice (1883), 75 Ala. 289; Donaghue v. Gaffy (1885), 53 Conn. 43, 2 Atl. Rep. 397.

[2] This seems to be the case in Alabama, Arkansas, Colorado, Georgia, Iowa, Kansas, Kentucky, Mississippi, Missouri, Montana, New Jersey, New Mexico, North Carolina and Tennessee.

[3] See *ante*, §§ 218-220.

[4] See Cleveland v. Woodward (1843), 15 Vt. 302, 40 Am. Dec. 682; North v. Bloss (1864), 30 N. Y. 374; Page v. Brant (1856), 18 Ill. 37; Hatch v. Wood (1862), 43 N. H. 633.

2. *Actions of Tort.*

§ 230. Actions of tort may be brought against all or any of the partners.— Causes of action in tort for wrongs committed either by the firm, or by a partner in its behalf, or by its servants or agents, are not joint, but joint and several, and the suit may be brought against all or any of the partners.

An exception to this rule is said to exist where the action arises in respect of their common interest in land, where all ought to be joined.

CHAPTER XIV.

OF THE TERMINATION OF THE PARTNERSHIP.

§ 231. Of the methods of termination in general.— The methods by which the partnership relation may be terminated may be classified, like those for terminating the relation of principal and agent, under two heads: I. By the act of the parties. II. By operation of law. The first of these may be further subdivided as follows: 1. By virtue of the original agreement of the parties. 2. By force of their subsequent act.

I. Termination by Act of the Parties.

1. *Termination by Original Agreement.*

§ 232. **What methods included.**— The partnership may be said to be terminated by original agreement where it comes to an end by virtue of some limitation expressly or impliedly put upon it by the parties at the time of its creation. There are two principal methods falling under this head: *a.* By lapse of time; *b.* By accomplishment of object.

§ 233. —— **Termination by lapse of time.**— *a.* Partnership is terminated by lapse of time where the period for its continuance was originally fixed by the agreement of the partners, and that period has elapsed. It may be continued afterwards by agreement, but this is practically the creation of a new partnership.[1]

§ 234. —— **Termination by accomplishment of object.**— *b.* Partnership comes to an end by accomplishment of its object where it was originally created for a single or temporary purpose, or a single transaction, and that purpose has been accomplished or that transaction has come to an end. Such a partnership may be continued by agreement or acquiescence, but otherwise it comes to an end.[2]

2. *Dissolution by Subsequent Act of Parties.*

§ 235. **In general.**— The dissolution of the partnership by the subsequent act of the parties may be the result of the act of all of the partners or of one. That act may be taken with the mutual consent of all, or it may be sought to be taken by one against the wish of the others.

§ 236. **Dissolution by act of all — Mutual consent.**— Dissolution by the act of all of the partners finds its most common form in dissolution by mutual consent. The same

[1] See Phillips v. Reeder (1866), 18 N. J. Eq. 95.

[2] See Sims v. Smith (1858), 11 Rich. (S. C.) L. 565; Bohrer v. Drake (1885), 33 Minn. 408, 23 N. W. Rep. 840; Bank of Montreal v. Page (1881), 98 Ill. 109.

persons who created the partnership may terminate it, and they may do this as well where it was originally created to endure for a fixed period, not yet expired, as where no period was fixed. The same result will practically ensue where all refuse to carry on the business or unite in winding it up and dividing the assets.[1]

§ 237. Dissolution by act of one partner — Partnerships at will.— The question of the power and right of one partner, or any number less than all, to dissolve the partnership depends largely upon the period for which it was created. If no time was fixed for its continuance, it is in law a partnership at will, and may be terminated by any partner without liability at any time.[2]

The civil, French and Scotch law declare that the right to dissolve even a partnership at will is subject to the conditions that it shall be exercised in good faith and at a reasonable time;[3] but these limitations do not appear to be recognized by the English common law.[4]

§ 238. Dissolution by act of one partner — Partnership on condition.— The partners may provide in their partnership agreement or articles that one partner shall have the right to terminate the partnership, though formed for a definite period, by giving a stipulated notice or upon the happening of a specified event. Where such a provision is made, the partner, by acting in pursuance of it, may lawfully terminate the partnership even though the period for which it otherwise would continue has not expired.[5]

[1] See Bank v. Page (1881), 98 Ill 109; Wells v. Ellis (1885), 68 Cal. 243, 9 Pac. Rep. 80; Ligare v. Peacock (1884), 109 Ill. 94; Richardson v. Gregory (1888), 126 Ill. 166, 18 N. E. Rep. 777.

[2] See Walker v. Whipple (1885), 58 Mich. 476, 25 N. W. Rep. 472; Blake v. Sweeting (1887), 121 Ill. 67, 12 N. E. Rep. 67; Fletcher v. Reed (1881), 131 Mass. 312, Paige's Partn. Cas. 192; Howell v. Harvey (1843), 5 Ark. 270, 39 Am. Dec. 376.

[3] See Howell v. Harvey, *supra*.

[4] See Story on Partnership, § 275.

[5] See Swift v. Ward (1890), 80 Iowa, 700, 45 N. W. Rep. 1044, 11 L. R. A. 302.

§ 239. Dissolution by one partner when for definite period.— If, however, the partnership was originally created to continue for a fixed period, and no provision is made for its earlier dissolution, its dissolution by one partner before that time has expired presents difficulties. The conduct of the other partners may be such as to justify a dissolution, or it may be sought at the mere will of one partner without any justification. Although the authorities are not uniform, the true principle is probably found in the same distinction which was observed in terminating the relation of principal and agent, *i. e.*, that of the *power* to revoke as distinguished from the *right* to revoke. Every partner has doubtless the *power* to withdraw from the firm and terminate the right of his partner to further bind him, at any time, even before the stipulated period, and without any other reason than his own will; but when he so revokes in violation of his agreement he subjects himself to an action for damages by his partner.

§ 240. Same subject — Can there be an indissoluble partnership?— In a leading case[1] upon this subject it is said that the right of one partner to dissolve the partnership "is a right inseparably incident to every partnership. There can be no such thing as an indissoluble partnership. Every partner has an indefeasible right to dissolve the partnership, as to all future contracts, by publishing his own volition to that effect; and after such publication the other members of the firm have no capacity to bind him by any contract. Even where partners covenant with each other that the partnership shall continue seven years, either partner may dissolve it the next day by proclaiming his determination for that purpose; the only consequence being that he thereby subjects himself to a claim for damages for a breach of his

[1] Skinner v. Dayton (1822), 19 Johns. (N. Y.) 513, 10 Am. Dec. 286. To same effect: Solomon v. Kirkwood (1884), 55 Mich. 256, 21 N. W. Rep. 336, Paige's Partn. Cas. 195; Mason v. Connell (1836), 1 Whart. (Pa.) 381; Slemmer's Appeal (1868), 58 Pa. St. 169, 98 Am. Dec. 255.

covenant. The power given by one partner to another to make joint contracts for them both is not only a revocable power, but a man can do no act to divest himself of the capacity to revoke it."

In another case,[1] in which the foregoing language was approved, the court said: "There may be cases in which equity would enjoin a dissolution for a time, when the circumstances were such as to make it specially injurious; but no question of equitable restraint arises here. When one partner becomes dissatisfied there is commonly no legal policy to be subserved by compelling a continuance of the relation, and the fact that a contract will be broken by the dissolution is no argument against the right to dissolve. Most contracts may be broken at pleasure, subject, however, to responsibility in damages. And that responsibility would exist in breaking a contract of partnership as in other cases."

§ 241. **Same subject.**— But this right of one partner to dissolve at will a partnership created for a fixed period has been vigorously denied. Thus, Mr. Justice Story has said: "Whenever a stipulation is positively made that the partnership shall endure for a fixed period, or for a particular adventure or voyage, it would seem to be at once inequitable and injurious to permit any partner, at his mere pleasure, to violate his engagement and thereby to jeopard, if not sacrifice, the whole objects of the partnership; for the success of the whole undertaking may depend upon the due accomplishment of the adventure or voyage, or the entire time be required to put the partnership into beneficial operation. It is no answer to say that such a violation of the engagement may entitle the injured partners to compensation in damages; for, independently of the delay and uncertainty attendant upon any such mode of redress, it is obvious that the remedy may be, nay, must be, in many cases utterly inadequate and unsatisfactory. If there be any real and just ground for the abandonment of the partnership, a court of

[1] Solomon v. Kirkwood, *supra.*

equity is competent to administer suitable redress. But that is exceedingly different from the right of the partner, *sua sponte*, from mere caprice, or at his own pleasure, to dissolve the partnership."[1]

§ 242. **Same subject.**— Courts have in several cases enjoined a dissolution where it would work irreparable injury or denied a decree for dissolution when sought in violation of the agreement. The unsettled condition of the law upon the subject, and the fact that a dissolution, conceding the right to make it, may often be impracticable of effect without judicial assistance, render it usually desirable, if not necessary, to have recourse to a court of equity when it is sought to enforce the dissolution of a partnership created for a fixed period. The reasons which will justify this proceeding will be discussed in later sections.

§ 243. **Method of dissolving by act of partner.**— No particular method of dissolving a partnership by the act of a partner is necessary. A voluntary sale or transfer of his interest by one partner works a dissolution. The same result, as has been seen, attends an involuntary sale by judicial process, as upon execution against the partner.[2]

In the absence of such a sale, an unconditional notice of the dissolution given by the partner to his partners is sufficient as between themselves. Even where the partnership was created by written instrument, or by instrument under seal, a dissolution by parol is usually held sufficient.[3]

II. Termination by Act or Operation of Law.

§ 244. **What methods included.** — Under this head will be included, though possibly somewhat illogically, 1, disso-

[1] Story on Partnership, § 275.

[2] See Slater v. Sands (1882), 29 Kan. 551; Wilson v. Waugh (1882), 101 Pa. St. 233; Carter v. Roland (1880), 53 Tex. 540.

[3] See Green v. State Bank (1890), 78 Tex. 2; Swift v. Ward (1890), 80 Iowa, 700, 45 N. W. Rep. 1044, 11 L. R. A. 302.

lutions caused by the mere operation of law in case of the happening of particular events, and 2, dissolutions decreed by law at the suit of one or more partners.

1. *Events Causing Dissolution.*

§ 245. **Death of a partner.**—Death of one partner operates to instantly dissolve an ordinary partnership, and this is usually held to be true even though the partnership articles provide for a continuance of the partnership by his executors or others, this being deemed to be really the creation of a new partnership rather than the mere continuation of the old.[1]

Where there were more than two partners, the death of one not only dissolves the partnership as to him, but it dissolves the partnership between the survivors also.

§ 246. **Insanity of a partner.**— Although opinions have differed upon the subject, the rule seems now to be settled that the insanity of one partner does not of itself work a dissolution of the firm, but may constitute sufficient ground to justify a court in decreeing a dissolution.[2]

§ 247. **Bankruptcy of a partner.**— Bankruptcy of one partner — by which is meant the public or statutory condition as distinguished from mere insolvency — operates to dissolve the partnership.[3]

The same result must also ensue from his assignment of all of his property — including his partnership interest — for the benefit of his creditors, or from the seizure and sale of

[1] See Vincent v. Martin (1885), 79 Ala. 540; Exchange Bank v. Tracy (1883), 77 Mo. 594; Schmidt v. Archer (1887), 113 Ind. 365, 14 N. E. Rep. 543; Durant v. Pierson (1891), 124 N. Y. 444, 26 N. E. Rep. 1095, 21 Am. St. Rep. 686; Van Kleeck v. Hammell (1891), 87 Mich. 599, 49 N. W. Rep. 872, 24 Am. St. Rep. 182; Stewart v. Robinson (1889), 115 N. Y. 328, 22 N. E. Rep. 160, 163, 5 L. R. A. 410.

[2] See Raymond v. Vaughn (1889), 128 Ill. 256, 21 N. E. Rep. 566, 15 Am. St. Rep. 112, 4 L. R. A. 440.

[3] See Eustis v. Bolles (1888), 146 Mass. 413, 16 N. E. Rep. 286, 4 Am. St. Rep. 327; Siegel v. Chidsey (1857), 28 Pa. St. 279, 70 Am. Dec. 124.

his interest at the suit of his individual creditors. *A fortiori* where all the partners unite in making an assignment of all of the partnership property for the benefit of its creditors, involving an entire suspension and winding up of partnership affairs, the partnership is dissolved.[1]

§ 248. **Marriage of partner.**— Marriage of a female partner to a non-partner, at common law, but not under most of the modern statutes, would operate to dissolve the partnership. Even under such statutes, if a male and a female partner intermarry the partnership would, in most states, be thereby dissolved.[2]

§ 249. **Guardianship of a partner.**— Guardianship of one partner, by virtue of which the management of his property is taken from him, operates probably to dissolve the partnership, and at all events would, like insanity, be a ground for decreeing a dissolution.[3]

§ 250. **War between countries of partners.**— War between the countries of which the partners are citizens at least suspends, and probably works a dissolution of, a commercial partnership.[4]

2. *Termination by Decree of Court.*

§ 251. **Declaring void.**— Before taking up the question of dissolution by decree, the present seems a convenient place for mentioning a remedy in the same line, but of far more extensive effect. Thus, instead of *dissolving* the partnership and thereby terminating it from the date of the decree, a court of equity may find sufficient ground for rescinding the contract of partnership altogether and declaring the part-

[1] See Wells v. Ellis (1885), 68 Cal. 243, 9 Pac. Rep. 80.

[2] See Brown v. Chancellor (1884), 61 Tex. 437; Bassett v. Shepardson (1883), 52 Mich. 3, 17 N. W. Rep. 217. See, also, *ante*, § 25.

[3] See Parsons on Partnership, § 303.

[4] Wood v. Wilder (1870), 43 N. Y. 164, 3 Am. Rep. 684; Hubbard v. Matthews (1873), 54 N. Y. 43, 13 Am. Rep. 562; Griswold v. Waddington, 16 Johns. (N. Y.) 438, 491.

nership void *ab initio*. This may be done where one partner has been induced through fraud, deception or oppression to enter into the partnership in the first instance.[1] "Where a person is induced," says Mr. Justice Lindley,[2] "by the false representations of others to become a partner with them, the court will rescind the contract of partnership at his instance; and will compel them to repay him whatever he may have paid them, with interest, and to indemnify him against all the debts and liabilities of the partnership, and, if the defendants have been guilty of fraud, against all claims and demands to which he may have become subject by reason of his having entered into partnership with them, he on the other hand accounting to them for what he may have received since his entry into the concern."

§ 252. **Dissolving in equity.**— Many causes, however, may exist which will justify a dissolution of the firm which would not suffice to render the partnership void *ab initio*.

Of the causes for which a court will thus decree a dissolution several examples may be given. The courts of law, it may be noticed, have no jurisdiction for this purpose, and the relief can be sought only in equity. The grounds for the intervention of the court are usually acts occurring since the formation of the partnership, but they may be acts or events preceding its formation. The occasion for seeking a dissolution in a court of equity arises usually only in those cases in which it was to continue for a definite term not yet expired, because, as has been seen, a partnership at will merely is ordinarily dissolvable at any time by the mere act of the parties.[3]

The fact that the articles provide for dissolution upon

[1] See Newbigging v. Adam (1886), L. R. 34 Ch. Div. 582; Mycock v. Beatson (1879), 13 Ch. Div. 384; Fogg v. Johnston (1855), 27 Ala. 432, 62 Am. Dec. 771; Howell v. Harvey (1843), 5 Ark. 270, 39 Am. Dec. 376; Oteri v. Scalzo (1891), 145 U. S. 578; Hynes v. Stewart (1850), 10 B. Mon. (Ky.) 429; Smith v. Everett (1879), 126 Mass. 304; Richards v. Todd (1879), 127 Mass. 167.

[2] Lindley on Partnership, vol. II (Ewell's ed.), 482.

[3] See *ante*, § 237.

notice given by one partner to the other does not prevent an application to a court of equity for dissolution.[1]

§ 253. **Causes for dissolution — Fraud.**— Fraud in the creation of a partnership, as has been seen, may be a sufficient ground for a rescission of the contract, but it may also be treated as a reason for decreeing a dissolution.[2]

§ 254. —— **Insanity or incapacity of partner.**— The insanity or other physical incapacity of one partner, while not sufficient of itself, as has been seen, to terminate the partnership as matter of law, will, if of such a character as to permanently disable the partner afflicted from performing the duties of the partnership, be sufficient ground for decreeing a dissolution.[3]

§ 255. —— **Misconduct of a partner.**— The misconduct of one partner, other than the one praying for relief, if of such a kind and degree as to render the further prosecution of the partnership inexpedient, injurious or impossible, may be ground for decreeing its dissolution. Courts will not interfere upon every disagreement between the partners, nor "enter into a consideration of mere partnership squabbles," but they will interfere where the misconduct of one partner or the dissension between the parties is so serious as to endanger the prosperity of the firm or destroy the confidence which must exist between partners. Thus, abandonment of the business by one partner, his persistent violation of the articles, excluding his copartner from participation, dishonesty, gross misconduct, and the like, have been held sufficient.[4]

[1] Adams v. Shewalter (1894), 139 Ind. 178, 38 N. E. Rep. 607.

[2] See Oteri v. Scalzo (1891), 145 U. S. 578, 12 Sup. Ct. Rep. 895, 36 L. ed. 824; Rosenstein v. Burns (1882), 41 Fed. Rep. 841.

[3] See Raymond v. Vaughn (1889), 128 Ill. 256, 15 Am. St. Rep. 112, 4 L. R. A. 440; Sayer v. Bennet (1783), 1 Cox, 107; Whitwell v. Arthur (1865), 35 Beav. 140; Jones v. Noy (1833), 2 M. & K. 125.

[4] See Seighortner v. Weissenborn (1869), 20 N. J. Eq. 172; Rosenstein v. Burns (1882), 41 Fed. Rep. 841; Groth v. Payment (1890), 79 Mich. 290; Cottle v. Leitch (1868), 35 Cal. 434; Holladay v. Elliott (1879), 8

§ 256. —— **Must not be misconduct of partner seeking dissolution.**— But the partner who is himself at fault will not be permitted to make use of his own misconduct to secure a dissolution. "A party who is the author of the ill-feeling between himself and his partners," said the court in one case,[1] "ought not to be permitted to make the relation he has induced the ground of a dissolution of the partnership. His conduct may have been taken with a view to that very result, and it would be inequitable to allow him advantage from his own wrongful acts. It would allow one partner, at his election, to put an end to his own deliberate contract, when the other had been guilty of no wrongful act or omission of duty."

§ 257. —— **Impossibility of success.**— So, though there be no misconduct, if the further prosecution of the partnership with profit or success has become impossible or impracticable, if its purpose or object has become unattainable, if it is found that the scheme or theory upon which the partnership was based was illusory or erroneous,— in these and like cases the court may decree its dissolution, as it is not to the advantage of any one that the business should be continued under such circumstances.[2]

Oreg. 84; Harrison v. Tennant (1856), 21 Beav. 482; Essel v. Hayward (1860), 30 Beav. 158.

[1] Gerard v. Gateau (1876), 84 Ill. 121, 25 Am. Rep. 438. See, also, Fairthorne v. Weston (1844), 3 Hare, 387.

[2] See Rosenstein v. Burns (1882), 41 Fed. Rep. 841; Holladay v. Elliott (1878), 8 Oreg. 84; Jennings v. Baddeley (1856), 3 K. & J. 78.

CHAPTER XV.

OF NOTICE OF THE DISSOLUTION.

§ 258. **The necessity of notice.**— The creation of a partnership and the transaction of its business are notice to the public that a relation has been entered into to which the law attaches certain incidents and liabilities. If this relation is terminated, it would seem to be a natural consequence that some notice of the fact should also be given, if it is desired to bring those incidents and liabilities to an end. And notice is required by law in many cases. We are now to consider when notice is required, to whom, and how it may be given.

§ 259. **In what cases notice is required — Not on dissolution by mere operation of law.**— As has been seen, the dissolution may result either from the act of the law or the act of the parties. The causes which will operate to dissolve the partnership by mere operation of law have been considered, and it is obvious that the existence of these causes is usually accompanied by facts and circumstances which must of themselves give publicity to the event. Thus, the fact that one of the partners has died is usually, if not always, accompanied by circumstances which must give publicity to the fact. The same is true of the bankruptcy of a partner, or the declaration of war between the countries of which

partners respectively are citizens. The result of this necessary and inherent publicity is the rule that no notice is required where the partnership is dissolved upon the happening of one of the events which terminate a partnership by mere operation of law.[1]

§ 260. —— Required on dissolution by or through act of parties.— But in the case of a dissolution by or through the act of parties, no such publicity is necessarily incident and therefore a different rule prevails. In such cases, whether the partnership comes to an end by lapse of time or by mutual consent, or by the act of one of the partners, notice must be given.

It must be given also where the partnership is dissolved by judicial decree at the suit of one of the partners.

§ 261. To whom notice required.— Notice may be required for two purposes and to two classes of persons:

1. If a partner intends to dissolve the partnership in pursuance of his power to do so, he must give his partners notice of that fact, both as a means to the dissolution, and also for the purpose of withdrawing the powers conferred upon them at the time the partnership was created. This question does not frequently arise, but the occasion exists.[2]

[1] See Griswold v. Waddington (1818), 15 Johns. (N. Y.) 57, 16 id. 438; Bank v. Matthews (1872), 49 N. Y. 12; Eustis v. Bolles (1888), 146 Mass. 413, 4 Am. St. Rep. 327, 16 N. E. Rep. 286. In this last case it is said: "The bankruptcy, like the death of a partner, dissolves the partnership; and, as it is a public and notorious proceeding, all creditors are bound to take notice of it, and no further notice need be given. The publication of bankruptcy or insolvency proceedings is legal notice to all persons by which they are bound. Story on Partnership, secs. 332-336; Arnold v. Brown, 24 Pick. (Mass.) 89, 94, 35 Am. Dec. 296; Marlett v. Jackman, 3 Allen (Mass.), 287; Butler v. Mullen, 100 Mass. 453."

[2] Thus, in Eagle v. Bucher (1856), 6 Ohio St. 295, 67 Am. Dec. 342, it is said: "That a partnership may be dissolved by the act of one of the partners we do not . . . intend to impugn. That is too well settled to be now questioned. But to effect that purpose, the act must be done with a view to its accomplishment. It should be communicated at once to the other

2. But the question most frequently arising, and the one giving most difficulty, is the question of notice to third persons. Of these there are two classes: those who have had previous dealings with the firm, and those who have not. The former have necessarily knowledge of the existence of the firm, and have had occasion to rely upon the credit of its members, while the latter have not necessarily known of it, and have been brought into no personal relation with it. Notice to both classes may be necessary — to the former because they have already known and trusted to the partnership; to the latter because if they do not already know of its existence, they may learn of it and be deceived by supposing it to continue; but the same kind of notice is not required for both classes. Thus —

§ 262. **How notice given — 1. To those who have had dealings with the firm.**— Persons of the first class, having actual notice of the existence of the partnership, and having given credit to it, should be given actual notice of its dissolution. It is immaterial how the notice is given or by whom; the important thing is that they receive it.

In one case,[1] after referring to the method of giving notice to strangers, the court said: "The rule is different in respect to persons who have dealt with the firm before the dissolution. The rule in such cases in this state requires that, to relieve a retiring partner from subsequent transactions in the partnership name, notice of the dissolution must be brought home to the persons giving credit to the partnership. If, in any way, by actual notice served, or by seeing

members of the firm. They should be advised of the new relations created by the withdrawal of a member, or a transfer of his interest in the concern. Their future relations toward each other, and their pursuit of the particular enterprise, depend on the acquisition of such knowledge." See, also, Abbot v. Johnson, 32 N. H. 9; Jones v. Lloyd, L. R. 18 Eq. 265, 271.

[1] Austin v. Holland (1877), 69 N. Y. 571, 25 Am. Rep. 246. In this case it was held that the mere mailing of a notice of dissolution was not sufficient; it must be received.

the publication of the dissolution, or by information derived from third persons, the party, at the time of the dealing, is made aware of the fact that the partnership has been dissolved, the contract will not bind the firm. It is sufficient to exempt the firm from liability that the person so contracting with a partner in the firm name knew or had reason to believe that the partnership had been dissolved, but this must appear and be found by the jury, or else the contract will be treated as the contract of the partnership."

A common method of giving the notice is by personal communication or by letter or circular addressed to and received by all persons with whom the firm has had dealings. Mailing the notice, properly addressed, raises a presumption of its due receipt, but the presumption is not conclusive and actual receipt must be shown.[1] Mere publication in a paper is obviously not enough; it must appear further that the party to be notified saw it or otherwise knew of it.[2]

§ 263. How notice given — 2. To strangers.— Of the persons who have not had dealings with the firm, there are likewise two classes — those who knew of the partnership but had not dealt with it, and those who did not know of it, prior to its dissolution. As to the latter class, it is said that no notice at all is necessary,[3] upon the ground that, as they did not

[1] Meyer v. Krohn, 114 Ill. 574.

[2] Notice of dissolution was published in a paper and a copy of the paper with a red line drawn about the notice was mailed to a former dealer residing in another town. Held not alone sufficient. Haynes v. Carter, 12 Heisk. (Tenn.) 7, 27 Am. Rep. 747. Proof of the publication of the notice in a newspaper is not sufficient where it is not shown that the other party either took or read the paper. Rose v. Coffield, 53 Md. 18, 36 Am. Rep. 389. Mere publication is not enough. Robinson v. Floyd (1893), 159 Pa. St. 165, 28 Atl. Rep. 258. See, also, Nicholson v. Moog (1880), 68 Ala. 471; Stoddard Mfg. Co. v. Krause (1889), 27 Neb. 83, 42 N. W. Rep. 918; Long v. Garnett (1883), 59 Tex. 229; Gilchrist v. Brande (1883), 58 Wis. 184, 15 N. W. Rep. 817; Backus v. Taylor (1882), 84 Ind. 503; Sibley v. Parsons (1892), 93 Mich. 538, 53 N. W. Rep. 786.

[3] See Austin v. Appling (1891), 88 Ga. 54, 13 S. E. Rep. 955; Swigert v. Aspden (1893), 52 Minn. 565, 54 N. W. Rep. 738.

learn of the existence of the partnership until it had actually been dissolved, they could have no reason for holding it liable; and this is doubtless correct where no element of estoppel is involved, though notice by publication, even in such cases, would be the safer course. As to the former, general notice is enough, and this notice may be given in a variety of ways, though publication for a reasonable period in a newspaper of general circulation at the place where the partnership business is carried on is deemed the most effectual and appropriate.[1]

[1] Thus, in Lovejoy v. Spafford (1876), 93 U. S. 430, 440, it is said: "We think it is not an absolute, inflexible rule that there must be a publication in a newspaper to protect a retiring partner. That is one of the circumstances contributing to or forming the general notice required. It is an important one, but it is not the only or an indispensable one. Any means that, in the language of Mr. Bell, are fair means to publish as widely as possible the fact of dissolution, or which, in the words of Judge Edmonds, are public and notorious to put the public on its guard; or, in the words of Judge Nelson, notice in any other public and notorious manner: or, in the language of Mr. Verplanck, notice by advertisement or otherwise, or by withdrawing the exterior indications of partnership, and giving the public notice in the manner usual in the community where he resides, are means and circumstances proper to be considered on the question of notice." See, also, Ellison v. Sexton (1890), 105 N. C. 356, 18 Am. St. Rep. 907, 11 S. E. Rep. 180; Polk v. Oliver (1879), 56 Miss. 566; Richards v. Butler (1880), 65 Ga. 598; Central Nat. Bank v. Frye (1889), 148 Mass. 498, 20 N. E. Rep. 325.

In Ellison v. Sexton, *supra*, the court said: "It is often difficult to determine what amounts to due and sufficient notice of the retirement of a partner; but the evidence to prove it should be such as would reasonably warrant the jury in finding the fact of notice; that the party to be charged with it actually had it, or might, by reasonable diligence, have learned of the dissolution of partnership and the retirement of the partner sought to be charged, from the means and opportunity supplied or afforded for the purpose of giving notice of the same. Generally, the reasonableness of the notice will be a mixed question of law and fact to be submitted to the jury, under proper instructions of the court, as to whether, under all the attending circumstances of the particular case, it was sufficient to warrant the inference of actual or constructive knowledge of the dissolution."

§ 264. Who should give notice — Actual and ostensible partners.— Notice of the dissolution may be given by either partner, and where the partnership is dissolved by mutual consent all of the partners usually unite in giving it. Each partner who withdraws from a firm is interested in giving notice, for, as will be seen,[1] where notice is required, a partner who retires, whether by sale of his interest or any other means, will, until notice is duly given, continue liable as a partner to those formerly dealing with the firm.

If the partner desiring to give notice is prevented by his copartners from exercising that right, they may be compelled to do what may be necessary to enable notice to be given, as to sign advertisements or join in notices to former customers.[2]

§ 265. —— Dormant and secret partners.— A dormant partner, *i. e.*, one both secret and passive, is not bound to give notice of his withdrawal, for no one of the public knew of his connection with the firm, and no one, therefore, could have relied upon it; but a mere secret partner is bound to give notice of his withdrawal to those who knew of his connection with the firm, though not to those who had no knowledge of it. A retiring dormant partner would also be liable to one who knew of his existence, if he were not given notice of his withdrawal.[3]

§ 266. Effect of not giving notice.— Where a partnership is dissolved or a known member of the firm retires, until the dissolution or retirement has been duly notified

[1] See *post*, § 266.

[2] 1 Lindley on Partnership (Ewell's ed.), 214; Troughton v. Hunter (1854), 18 Beav. 470; Hendry v. Turner (1886), 32 Ch. Div. 355.

[3] See Elmira Iron Co. v. Harris (1891), 124 N. Y. 280, 26 N. E. Rep. 541; Elkinton v. Booth (1887), 143 Mass. 479, 10 N. E. Rep. 460, Austin v. Appling (1891), 88 Ga. 54, 13 S. E. Rep. 955; Nussbaumer v. Becker (1877), 87 Ill. 281, 29 Am. Rep. 53; Lieb v. Craddock (1888), 87 Ky. 525, 9 S. W. Rep. 838; Pitkin v. Benfer (1892), 50 Kan. 108, 31 Pac. Rep. 695, 34 Am. St. Rep. 110; Brown v. Foster (1894), — S. C. —, 19 S. E. Rep. 299.

the power of each partner to bind the others by contract with third persons remains unimpaired, although as between themselves such authority is at an end.[1]

The retiring partner, in the absence of notice, remains liable also, it is said, for the torts committed subsequently by his late partners or their agents in the line of their former business.[2]

[1] See Morrill v. Bissell (1894), 99 Mich. 409, and note; Prentiss v. Sinclair (1831), 5 Vt. 149, 26 Am. Dec. 288, and note; Austin v. Holland (1877), 69 N. Y. 571, 25 Am. Rep. 246.

[2] See 1 Lindley on Partnership (Ewell's ed.), 214, citing Stables v. Eley (1825), 1 Car. & P. 614. But see Pollock's Digest of Partnership (6th ed.), 54.

CHAPTER XVI.

OF THE EFFECT OF DISSOLUTION UPON THE POWERS OF PARTNERS.

§ 267. **In general.**— The firm being dissolved for some sufficient reason, and due notice having been given when necessary, it remains to be considered what is the effect of the dissolution, particularly as respects the powers and duties of the partners. For reasons which will be obvious, dissolution by death, which completely removes one of the partners, presents an aspect entirely different from that presented when dissolution results from any other cause, leaving all partners alive and capable or desirous of acting. The condition of the surviving partner, therefore, must be separately considered.

§ 268. **Rights, powers and liabilities of the surviving partner.**— The death of one partner operates, as has been seen, to dissolve the partnership. Upon dissolution by death the entire legal title to all the partnership assets passes to the surviving partner or partners.[1] They alone, to the ex-

[1] In Barry v. Briggs (1871), 22 Mich. 201, the rule is stated that a sole surviving partner has the entire legal title to all the partnership assets. He has the right, acting honestly and with reasonable discretion and diligence, to dispose of them as he pleases, to settle all debts against the concern, to make any compromise he may deem necessary, and to turn the assets into an available and distributable form. As to partnership real estate, see *ante*, § 111.

clusion of the representatives of the deceased partner, have the right to the possession of the partnership property, and to collect or receive debts due the firm. Causes of action, at law, survive to or against them, and therefore they alone are the ones to sue or be sued in respect to partnership dealings.[1] But while they have the legal title, they hold it in trust for the firm, and it is their duty to apply the assets to the payment of the debts, to close up the business with reasonable promptness,[2] and to account to the representatives of the deceased partner for his share of the final balance.[3] In their dealings with partnership assets, the surviving partners are charged with all the duties of fair dealing and regard for the interests of the firm which are required of other trustees.[4] While engaged in closing up the business, the surviving partners may exercise such powers as are reasonably necessary to accomplish that purpose. Thus they may sell, mortgage or pledge the property, borrow money,[5]

[1] The last surviving partner or partners are to sue and be sued in respect of partnership affairs. 1 Lindley on Partnership (Ewell's ed.), 288.

[2] See Clay v. Field (1888), 34 Fed. Rep. 375, Paige's Partn. Cas. 213.

[3] See Valentine v. Wysor (1890), 123 Ind. 47, 7 L. R. A. 788.

[4] A surviving partner occupies the position of trustee, and cannot be permitted to make gain for himself at the expense of the estate of a deceased partner. Little v. Caldwell (1894), 101 Cal. 553, 36 Pac. Rep. 107, 40 Am. St. Rep. 89; Galbraith v. Tracy (1894), 153 Ill. 54, 38 N. E. Rep. 937, 46 Am. St. Rep. 867, 28 L. R. A. 129. He cannot buy of or sell to himself. Denholm v. McKay (1889), 148 Mass. 434, 19 N. E. Rep. 551, 12 Am. St. Rep. 574. If he misappropriates the assets, equity will give relief. Russell v. McCall (1894), 141 N. Y. 437, 36 N. E. Rep. 498, 38 Am. St. Rep. 807. He is bound to keep accurate accounts and to keep the representatives of the deceased partner informed of all that properly concerns them. Heath v. Waters (1879), 40 Mich. 457.

[5] Thus in Durant v. Pierson (1891), 124 N. Y. 444, 26 N. E. Rep. 1095, 21 Am. St. Rep. 686, 12 L. R. A. 146, the court say: "When a partnership is dissolved by the death of a partner, the survivor is entitled to the possession and control of the joint property for the purpose of closing its business, and to that end and for that purpose he may, according to the settled principles of the law of partnership, administer the affairs of the firm, and by sale, mortgage, or other reasonable disposition of the property, make provision for meeting its obliga-

or make an assignment for the benefit of creditors.[1] They should complete the executory contracts into which the firm had entered, and for this purpose have the power to purchase materials, employ assistance or make such other incidental contracts as the case reasonably requires.[2] Upon the death of the sole surviving partner before the estate is closed, his powers and liabilities pass to his administrator or executor.[3] The right of the survivor to compensation has already been referred to in a previous section.[4]

§ 269. **Same subject — Continuing business under provisions of will.**— The authority of the surviving partners is to close up and not to continue the partnership affairs, and they have therefore no right to make new contracts, engage in fresh enterprises or to carry on the partnership business for any longer period than is reasonably necessary to enable the affairs to be closed up without unnecessary loss or injury. If, in violation of their duty, they do continue the business, they may be restrained by injunction, or

tions. He may, for that purpose, borrow money, and give a valid pledge of the copartnership property for its repayment. Williams v. Whedon, 109 N. Y. 333, 4 Am. St. Rep. 460; Emerson v. Senter, 118 U. S. 3, 8; Fitzpatrick v. Flannagan, 106 U. S. 648; Butchart v. Dresser, 4 DeGex, M. & G. 542, 10 Hare, 453; In re Clough, Bradford Commercial Banking Co. v. Cure, L. R. 31 Ch. Div. 326." See, also, Barton v. Lovejoy (1894), 56 Minn. 380, 57 N. W. Rep. 935, 46 Am. St. Rep. 482.

[1] Although there has been a little doubt about the power of the survivor to make an assignment for the benefit of creditors, the weight of authority undoubtedly sustains it (Fitzpatrick v. Flannagan (1882), 106 U. S. 654, 27 L. ed. 211; Emerson v. Senter (1885), 118 U. S. 3, 30 L. ed. 49; Williams v. Whedon (1888), 109 N. Y. 333, 16 N. E. Rep. 365, 4 Am. St. Rep. 460; Patton v. Leftwich (1889), 86 Va. 421, 10 S. E. Rep. 686, 19 Am. St. Rep. 902, 6 L. R. A. 569); in the absence of a statute forbidding. Shattuck v. Chandler (1889), 40 Kan. 516, 20 Pac. Rep. 225, 10 Am. St. Rep. 227.

[2] See Little v. Caldwell (1894), 101 Cal. 553, 36 Pac. Rep. 107, 40 Am. St. Rep. 89; Calvert v. Miller (1886), 94 N. C. 600; Oliver v. Forrester (1880), 96 Ill. 315.

[3] Galbraith v. Tracy (1894), 153 Ill. 54, 38 N. E. Rep. 937, 46 Am. St. Rep. 867, 28 L. R. A. 129; Dayton v. Bartlett (1882), 38 Ohio St. 357; Brooks v. Brooks (1873), 12 Heisk. (Tenn.) 12.

[4] See *ante*, § 119.

they may be held accountable for interest or profits and will be charged personally with the losses.[1]

The deceased partner may, however, by his will authorize the business to be carried on for a period limited therein, either by the survivors alone or by the survivors and his executors jointly, and the business may be continued in pursuance of such a provision.[2] In such a case, unless there is something in the will to indicate a contrary purpose, it will be presumed that the deceased intended to subject to the hazard of the business only the capital already embarked in it, and not the general residue of his estate.[3]

Where there is no will, the persons who are entitled to receive the deceased partner's share may consent to a continuance of the business on such terms as they may deem advisable.[4]

§ 270. **Same subject — Liability of estate of deceased partner.**— Although, as has been seen,[5] causes of action against the firm, at common law, survive against the surviving partners only, the estate of the deceased partner is not thereby released from all liability in equity. The surviving partners who had paid the debt might have contribution in equity from the estate of the deceased partner, and, by extending this equity of the surviving partners to the creditor himself, the rule is now established in England and many of the United States that the creditor may proceed either against the survivors at law, or, without having any recourse to them or attempting to exhaust the partnership assets, he may in equity proceed at once against the estate of the deceased partner.[6] In several states by statute this

[1] See Story on Partnership, § 343; Robinson v. Simmons (1888), 146 Mass. 167, 15 N. E. Rep. 558, 4 Am. St. Rep. 299.

[2] See Stewart v. Robinson (1889), 115 N. Y. 328, 22 N. E. Rep. 160, 5 L. R. A. 410.

[3] See Smith v. Ayer (1879), 101 U. S. 320, 25 L. ed. 955; Jones v. Walker (1880), 103 U. S. 444, 26 L. ed. 404, Paige's Partn. Cas. 209.

[4] See Robinson v. Simmons, *supra*.

[5] See *ante*, § 268.

[6] See Doggett v. Dill (1884), 108 Ill. 560, 48 Am. Rep. 565, where many cases are collected; Nelson v. Hill (1847), 5 How. (U. S.) 127.

method of procedure is expressly authorized.[1] Other states, however, such as New York, Georgia, Wisconsin and perhaps some others have declined to adopt this rule, and permit recourse to the estate of the deceased only when the firm and the survivors are insolvent.[2]

§ 271. Powers of partners after dissolution — Powers continue for the purpose of closing up the business.— The dissolution of the partnership terminates entirely the power of each partner to continue to bind the firm by *new* contracts. The power of each partner is thenceforward limited to closing up the partnership affairs, but for this purpose his authority is deemed to continue, with all the rights and incidents as before. Thus either partner may, after dissolution, receive payment of firm debts and give discharges therefor; sell the partnership property; pay the firm debts; or do any other act respecting the closing up of previous transactions which he might do if the partnership still continued.[3]

Unless they agree otherwise, each of the former partners has an equal right to the possession of the assets, and is under an equal duty to apply them to the discharge of partnership obligations.[4]

Where there are more than two partners, the majority have the same power to control the winding up of the business that they have to direct its conduct before dissolution.[5]

[1] Thus, see Camp v. Grant (1851), 21 Conn. 41, 54 Am. Dec. 321; Manning v. Williams (1851), 2 Mich. 105; Ralston v. Moore (1885), 105 Ind. 243, 4 N. E. Rep. 673; Blair v. Wood (1884), 108 Pa. St. 278; McLain v. Carson (1842), 4 Ark. 164, 37 Am. Dec. 777.

[2] See Pape v. Cole (1873), 55 N. Y. 124, 14 Am. Rep. 198; Sherman v. Kreul (1877), 42 Wis. 33; Pullen v. Whitfield (1875), 55 Ga. 174; Pearson v. Keely (1845), 6 B. Mon. (Ky.) 128, 43 Am. Dec. 160.

[3] See Heart v. Walsh (1874), 75 Ill. 200; Ruffner v. Hewitt (1874), 7 W. Va. 585; Seldner v. Mt. Jackson Nat. Bank (1887), 66 Md. 488, 59 Am. Rep. 190; Perkins v. Butler Co. (1895), 44 Neb. 110, 62 N. W. Rep. 308; Western Stage Co. v. Walker (1856), 2 Iowa, 504, 65 Am. Dec. 789; Davis v. Megroz (1893), 55 N. J. L. 427.

[4] Gray v. Green (1894), 142 N. Y. 316, 37 N. E. Rep. 124, 40 Am. St. Rep. 596.

[5] Western Stage Co. v. Walker, *supra*.

§ 272. —— **No power to create new obligations.**— But with the closing up or completion of old transactions the power of each partner after dissolution ends. He cannot create new obligations, or vary the character, form or obligation of those already existing. Hence he cannot, after dissolution, bind his partners by making, accepting, indorsing or renewing negotiable paper; create a new or revive an old debt against them; remove the bar of the statute of limitations as to them, or bind them by admissions or declarations not relating to prior transactions;[1] provided, of course, in all cases, that due notice of the dissolution had been given.[2]

§ 273. **Powers of settling or liquidating partner.**— Instead of all the partners participating in the settlement of the partnership affairs after dissolution, as contemplated in the last section, the partners may, upon such dissolution, agree that one of the partners only shall proceed to liquidate the affairs of the firm. An express agreement to this effect is not indispensable; it may be shown by acquiescence. The effect of such an agreement is not to enlarge the powers of the settling partner, but to exclude the others from participation. Such an agreement could not, of course, affect third persons who had no notice of it, but if they have notice they will be subject to the equities of the partners if they do not deal only with the partner so specified.

[1] See Humphries v. Chastain (1848), 5 Ga. 166, 48 Am. Dec. 247; White v. Tudor (1860), 24 Tex. 639, 76 Am. Dec. 126; Van Keuren v. Parmelee (1849), 2 N. Y. 523, 51 Am. Dec. 322; Tate v. Clements (1878), 16 Fla. 339, 26 Am. Rep. 709; Mayberry v. Willoughby (1877), 5 Neb. 368, 25 Am. Rep. 491; Pennoyer v. David (1860), 8 Mich. 407; Clement v. Clement (1887), 69 Wis. 599, 35 N. W. Rep. 17, 2 Am. St. Rep. 760.

There are cases holding otherwise as to the power of one partner to prevent the operation of the statute of limitations by admissions or payments, following Whitcomb v. Whiting, 2 Doug. (Eng.) 652, such as Beardsley v. Hall (1869), 36 Conn. 270, 4 Am. Rep. 74; Merritt v. Day (1875), 38 N. J. L. 32, 20 Am. Rep. 362, but the weight of authority is opposed to these cases.

[2] In Tate v. Clements, *supra*, it is, indeed, said that notice is not nec-

The liquidating partner is bound to be diligent and must not unreasonably prolong the settlement. If he does, equity may interfere. His duty of good faith and fair dealing is perhaps intensified by his position as sole administrator.

He has, like any other partner after dissolution, power to wind up and complete partnership transactions only, and not to create new debts or obligations against his former partners; but for the purposes of winding up, collecting debts, discharging obligations, and reducing the assets to an available and distributable form, all the powers of the partners are concentrated in him and may be exercised accordingly.[1]

essary, as the requirement of notice has reference to future dealings only; but see Clement v. Clement, *supra;* Sage v. Ensign (1861), 2 Allen (Mass.), 245.

[1] See Palmer v. Dodge (1854), 4 Ohio St. 21, 62 Am. Dec. 271; Hilton v. Vanderbilt (1880), 82 N. Y. 591; Gilmore v. Ham (1894), 142 N. Y. 1, 36 N. E. Rep. 826, 40 Am. St. Rep. 554. In Pennsylvania, see Estate of Davis (1840), 5 Whart. 530, 34 Am. Dec. 574; Fulton v. Central Bank (1879), 92 Pa. St. 112; Earon v. Mackey (1884), 106 Pa. St. 452.

CHAPTER XVII.

OF SPECIAL AGREEMENTS BETWEEN THE PARTNERS AT DISSOLUTION.

§ 274. Agreements as to distribution of property or payment of debts.— It is not uncommon for the partners to agree at dissolution as to the distribution of the partnership property or the payment of the partnership debts. Thus, an agreement that the continuing partner shall assume and pay the partnership debts is often made, and, even though not expressly made, would be implied to the extent of the firm assets received by the continuing partners.[1] It is not an agreement to answer for the debt of another, and is therefore valid though not in writing.[2] ✓

Such agreements are entirely valid as between the partners themselves, but they do not bind the firm creditors unless the latter become a party to them. The liability of each partner for the payment of the partnership debts continues *in solido* after dissolution as before; and creditors cannot be cut off from their remedies by any agreement between the partners alone. They neither lose their right to proceed against the partner in whose favor the arrangement is made, nor are they required to first exhaust their remedies against the other.

[1] See Hobbs v. Wilson (1865), 1 W. Va. 50; Peyton v. Lewis (1851), 12 B. Mon. (Ky.) 356.

[2] See Hunt v. Rogers (1863), 7 Allen (Mass.), 469; Vanness v. Dubois (1878), 64 Ind. 338.

§ 275. —— **Creating relation of principal and surety.** Such an agreement, however, it has been held, creates the relation of principal and surety between the partners — the partner assuming the debts being the principal and the other the surety,— and creditors who have notice of this arrangement have been held bound to respect the rights of the surety as in other cases.[1] Thus, it has been held that an extension of time to the partner who has thus become the principal debtor will release the other,[2] though this has been denied;[3] and if the latter pays the debt he is entitled to the benefit of the securities which the creditor held against the principal debtor.[4]

§ 276. —— **Creditor's assent to arrangement.**— An assent, however, by the creditor to the assumption by one partner of the firm's debt to such creditor, and an agreement by the creditor to look to such partner alone for payment, if upon a sufficient consideration, will amount to a novation and discharge the retiring partner; but such assent must be actual, and will not ordinarily be implied from mere silence.[5] And unless there is a sufficient consideration, the agreement of the creditor to release the retiring partner and look only to the others will not be binding.[6]

[1] See Smith v. Sheldon (1876), 35 Mich. 42, 24 Am. Rep. 529; Johnson v. Young (1882), 20 W. Va. 614; Fernald v. Clark (1892), 84 Me. 234, 24 Atl. Rep. 823; Brill v. Hoile (1881), 53 Wis. 537, 11 N. W. Rep. 42; Bank v. Green (1884), 40 Ohio St. 431; Leithauser v. Baumeister (1891), 47 Minn. 151, 49 N. W. Rep. 660, 28 Am. St. Rep. 336.

[2] Smith v. Sheldon, *supra;* Brill v. Hoile, *supra;* Leithauser v. Baumeister, *supra.*

[3] See Barnes v. Boyers (1890), 34 W. Va. 303, 12 S. E. Rep. 708; National Cash Register Co. v. Brown (1897), 19 Mont. 200, 61 Am. St. Rep. 498.

[4] See Fernald v. Clark, *supra;* Johnson v. Young, *supra.*

[5] See Bank v. Green (1884), 40 Ohio St. 431; York v. Orton (1885), 65 Wis. 6, Paige's Partn. Cas. 160; Barnes v. Boyers (1890), 34 W. Va. 303, 12 S. E. Rep. 708.

[6] Eagle Mfg. Co. v. Jennings (1883), 29 Kan. 657, 44 Am. Rep. 668.

CHAPTER XVIII.

OF THE LIEN OF PARTNERS.

§ 277. **In general.**— Something has been already said regarding the right of each partner to insist that the partnership assets shall be applied to the payment of the partnership debts; and it has been noticed that the right is often spoken of as the partner's lien.[1] Before taking up the subject of the application of the assets and the final accounting, a little further consideration of this subject seems desirable. In dealing with this matter, the language of Mr. Justice Lindley will be largely adopted.[2]

§ 278. **Nature of the right.**— In order to discharge himself from his liabilities as a partner, every partner has a right to have the property of the partnership applied in payment of the partnership debts. In order, also, to secure a proper division of the surplus assets, he has a right to have whatever may be due to the firm from his copartners, as members thereof, deducted from what otherwise would be payable to them in respect of their shares in the partnership. In other words, each partner may be said to have an equitable lien on the partnership property for the purpose of having it applied in payment of the partnership debts; and also a similar lien upon the surplus assets for the purpose of having them applied in payment of what may be due to the part-

[1] See *ante*, § 122.

[2] See 1 Lindley on Partnership (Ewell's 2d ed.), 352 *et seq.*

ners respectively, after deducting what may be due from them as partners, to the firm.[1]

§ 279. **Same subject — When it becomes important.**— This right or lien does not exist for any practical purpose until the affairs of the partnership have to be wound up, or the share of a partner has to be ascertained; nor has any partner thereby, as has been seen,[2] a right to insist that firm creditors shall exhaust the firm assets before having recourse to the partners as individuals. But when partnership accounts have to be taken, and the shares of the partners have to be ascertained, the lien of the partners on the firm assets and on each other's shares becomes of the greatest importance.

§ 280. **To what the lien attaches.**— During the continuance of the partnership the lien attaches to everything which can be considered partnership property. It is not lost by substitution of new stock for old, and on the death or bankruptcy of a partner his lien continues in favor of those who represent him until his share has been ascertained and provided for by the other partners. After the partnership has been dissolved, however, the lien is confined to what was partnership property at the time of the dissolution, and does not extend to what may have been subsequently acquired by those who continue to carry on the business.

As the lien extends only to that which is firm property, if the partnership be one in the profits only, the lien can attach to the profits alone and not to the means by which those profits were produced.[3] And as it is an incident of partnership, it does not exist where there is really no partnership but only a joint adventure, in respect of which each retains the title to his own goods and their proceeds.[4]

[1] See 1 Lindley, *supra;* Pearson v. Keedy (1845), 6 B. Mon. (Ky.) 128, 43 Am. Dec. 160; Bardwell v. Perry (1847), 19 Vt. 292, 47 Am. Dec. 687.

[2] See *ante,* § 215.

[3] See *ante,* § 52.

[4] 1 Lindley, 358 (Ewell's 2d ed.).

§ 281. **Against whom lien exists.**— The lien of each partner exists not only as against the other partners, but also against all persons claiming through them or any of them.[1] It is available, therefore, against their executors, execution creditors and assignees or trustees in bankruptcy.[2] While, however, it exists against the share of each partner and against a person who purchases that share from him, it would defeat the purposes of the partnership to enforce it against the purchaser of firm property in the ordinary course of business; and a person, therefore, who in good faith purchases from one partner specific chattels belonging to the firm, acquires a good title thereto notwithstanding the liens which the other partners might have had prior to the sale.[3]

§ 282. **What the lien secures.**— The lien of the partners is intended to secure whatever is due to or from the firm by or to the members thereof as such. It does not, therefore, extend to debts incurred between the firm and its members otherwise than in their capacity as partners, and in case of the bankruptcy of a partner his assignees may claim his share without regard to such a debt; as, for example, a debt for money borrowed by one partner from the firm for a purely private purpose of his own.[4]

§ 283. **How lien is lost.**— The partner's lien on partnership property is lost by the conversion of such property into the separate property of another partner, or into the property of a stranger with the other partner's consent. If, therefore, on dissolution the property of the firm is divided between the partners upon the understanding that the debts shall be paid in some specified way, the lien is gone and the partners cannot reclaim the property, although the debts remain unpaid.[5] So where one partner sells out all of his

[1] 1 Lindley, 354 (Ewell's 2d ed.).

[2] See Kirby v. Schoonmaker (1848), 3 Barb. Ch. (N. Y.) 46, 49 Am. Dec. 160.

[3] See 1 Lindley, *ubi supra*.

[4] See 1 Lindley, 354 (Ewell's 2d ed.).

[5] See 1 Lindley, 355 (Ewell's 2d ed.); Miller v. Estill (1856), 5 Ohio St. 508,

interest in the firm to his copartner, and the latter agrees to pay the debts of the partnership, the lien of the selling partner is gone, and, as an incident, as will be seen,[1] the rights of the firm creditors to priority of payment out of the assets, which is a right worked out through the right of the partner,[2] is, in many cases, held to be gone also.[3]

§ 284. No lien if partnership illegal.— If the partnership is illegal, its members have no lien upon their common property or upon each other's shares therein, unless it be by virtue of some agreement not affected by the illegality.[4]

67 Am. Dec. 805; Smith v. Edwards (1846), 7 Humph. (Tenn.) 106, 46 Am. Dec. 71.

[1] See *post*, § 298.

[2] See *ante*, § 124.

[3] See Miller v. Estill, *supra;* Ladd v. Griswold (1847), 4 Gilm. (Ill.) 25, 46 Am. Dec. 443. But see more fully, *post*, § 298.

[4] 1 Lindley, 355 (Ewell's 2d ed.).

CHAPTER XIX.

OF THE APPLICATION OF THE PARTNERSHIP ASSETS.

§ 285. **In general.**— The question of the proper application and distribution of the partnership assets has given rise to no little difficulty and conflict of decision. The chief sources of difficulty have been disputes between the creditors of the partnership and the creditors of the individual partners. May the creditors of the individual partners obtain, in any way, the application of partnership funds to their claims? May partnership creditors, whose claims are not satisfied out of the partnership property, have recourse to the individual property of the partner, and in such case may they share equally with individual creditors or must they be postponed until individual creditors are paid? These and similar questions indicate the difficulties which arise.

§ 286. **What principles control.**—At the foundation of the matter lies the rule, already noticed,[1] which must constantly be kept in mind. The capital or property of the firm has been contributed for partnership purposes, and it is part of the implied, if not the express, understanding between the partners, that the partnership property shall be used only for partnership purposes, *e. g.*, to pay partnership debts. Each partner has therefore the right to insist that the partnership property shall be so applied. This right is the right of the partners as between themselves; but it has sometimes been regarded, not as the right of the partners, but as the right of the partnership creditors, and many cases have been decided upon this erroneous assumption. If it is a right of the partners, it is one which they may waive if they see fit to do so; but if it is a right of the creditors, then it is not one which the partners can waive.

The question may present a different aspect if it arises while the partnership is still going on than it will if it arises after the partnership has been dissolved and the affairs are being wound up under judicial direction, and we will therefore separately consider each phase.

§ 287. **Application of the assets of a going partnership by the partners themselves.**—While the affairs of the partnership are still going on and its property and business are still in the hands of the partners themselves, it is, in general, true that they may make such disposition of the property as they see fit. It has sometimes been said that the partnership creditors have a kind of lien upon the partnership assets, but this is not true. It is the property of the partners, which they may, in general, deal with as they please.[2] Thus they

[1] See *ante*, §§ 122–124.

[2] Thus in Reyburn v. Mitchell (1891), 106 Mo. 365, 16 S. W. Rep. 592, 27 Am. St. Rep. 350, the court, quoting from Sexton v. Anderson, 95 Mo. 381, say: "The partners may, so long as the firm exists, do with their property as they see fit. The firm creditors have no lien on the partnership property for the payment of their debts while the firm continues to exist. Partners have a right to have the partnership property applied to partner-

may sell it, mortgage it, or turn it out in payment of their partnership debts. They may sell it all in good faith, and the purchaser will get a good title, even though the firm was insolvent. They may also, it is held, transfer the firm property to pay their joint debt, though it be not a partnership debt, and the joint creditor will thereby obtain a good title to the firm property.[1]

§ 288. Same subject — Right of firm to assume or pay individual debts of the partners.— Whether, however, the partners may apply the partnership property in payment of the individual debt of one of the partners has been much disputed. It is conceded that they may do this if they reserve enough to satisfy the partnership creditors;[2] but where the partnership is already insolvent, or where such an application will leave it insolvent and unable to pay the partnership debts, there is controversy.

It is held, on the one hand, that if the firm is then insolvent, or if such an application of their assets will make them insolvent, it would be fraud upon the partnership cred-

ship purposes, but this is a right or lien which they may waive. Hence the great majority of adjudicated cases are to this effect: that all the partners may, by their joint act, dispose of partnership property in liquidation and payment of a debt owing by an individual member of the firm. The qualification is that the transaction must be in good faith, and not for fraudulent purposes."

[1] Thus in Saunders v. Reilly (1887), 105 N. Y. 12, 12 N. E. Rep. 170, 59 Am. Rep. 472, the court say: "All members of a firm may sell the partnership property, even if wholly insolvent, to a purchaser in good faith, and thus convey, free from the claim of firm creditors, a good title to the firm property. Instead of selling for cash, they may transfer firm property to pay a firm debt. And they may transfer the firm property to pay a joint debt for which they are jointly liable outside of the business of the firm, and the joint creditor will obtain a good title to the firm property." To same effect: Citizens' Bank v. Williams (1891), 128 N. Y. 77, 28 N. E. Rep. 33, 26 Am. St. Rep. 454.

[2] See Schmidlapp v. Currie (1878), 55 Miss. 597, 30 Am. Rep. 530; Hage v. Campbell (1891), 78 Wis. 572, 47 N. W. Rep. 179, 23 Am. St. Rep. 422; Woodmansie v. Holcomb (1885), 34 Kan. 35, 7 Pac. Rep. 603; Jewett v. Meech (1884), 101 Ind. 289.

itors to permit such an application, and it will therefore not be allowed.[1]

It is contended, on the other hand, that if done while the partners are still in control of their business, they may make such an application, if they act in good faith, though they were already or thereby became insolvent.[2]

The weight of modern authority seems to support the latter view.

[1] See Ransom v. Vandeventer (1863), 41 Barb. (N. Y.) 307; Wilson v. Robertson (1860), 21 N. Y. 587; Hage v. Campbell, *supra;* Menagh v. Whitwell (1873), 52 N. Y. 146, 11 Am. Rep. 683, Ames' Cases on Partn. 229; Kurner v. O'Neil (1894), 39 W. Va. 515, 20 S. E. Rep. 589; Hill v. Draper (1894), 58 Ark. 625, 24 S. W. Rep. 1075.

In Arnold v. Hagerman (1888), 45 N. J. Eq. 186, 17 Atl. Rep. 93, 14 Am. St. Rep. 712, the court, adopting the language of Clements v. Jessup, 36 N. J. Eq. 569, says: "Partnership creditors, in equity, have an inherent priority of claim upon partnership property over individual creditors; and a transfer of partnership property by one partner, with the consent of the other partners, or by all the partners, to pay individual debts, is fraudulent and void as to firm creditors, unless the firm was then solvent and had sufficient property remaining to pay the partnership debts."

The indorsement of a note in the firm name to secure the liability of one of the partners when the firm is insolvent is not fraudulent as against firm creditors, provided it is done for an honest purpose, with the consent of the members of the firm, and the indorsee did not know that the firm was insolvent. Bernheimer v. Rindskopf (1889), 116 N. Y. 428, 22 N. E. Rep. 1074, 15 Am. St. Rep. 414.

[2] In Goddard-Peck Grocery Co. v. McCune (1894), 122 Mo. 426, 25 S. W. Rep. 904, 29 L. R. A. 681, the court say: "No principle of law is better settled than that, in the administration of an insolvent partnership estate, the assets of the firm must be applied to the satisfaction of the firm creditors to the exclusion of the creditors of the individual partners. Hundley v. Farris, 103 Mo. 78, 12 L. R. A. 254; First Nat. Bank v. Brenneisen, 97 Mo. 148, and cases cited in each. The principle we think equally well settled by the more recent decisions of this court, as well as by the weight of judicial authority in other jurisdictions, that the assets of an insolvent firm, before dissolution, may, with the consent of all the partners, be applied to the satisfaction of all the individual debts of the members of the firm, when done in good faith. Sexton v. Anderson, 95 Mo. 380; Reyburn v. Mitchell, 106 Mo. 365 (*supra*), and cases cited in each; Seger's Sons v. Thomas Bros., 107 Mo. 635. As Phelps v. McNeely, 66 Mo. 555, 27 Am. Rep. 378, is in conflict with

§ 289. Application of assets when distributed by court—Firm creditors first paid out of firm assets.— When, however, the management of the partnership assets is taken out of the hands of the partners — who have made no previous disposition of them[1] — and put under the control of the

the cases last cited and the great weight of authority, it should not be followed and is overruled."

In Fisher v. Syfers (1887), 109 Ind. 514, 10 N. E. Rep. 306, it is said: "The rule that obtains in the distribution of the estate of partners, and under which partnership creditors are entitled to priority of payment out of the partnership assets, is an equitable doctrine for the benefit and protection of the partners respectively. Partnership creditors have no lien upon partnership property; their right to priority of payment out of the firm assets, over the individual creditors, is always worked out through the liens of the partners. Warren v. Farmer, 100 Ind. 593; Trentman v. Swartzell, 85 Ind. 443. Upon the death of one partner, or where the firm becomes bankrupt, or where the partnership assets are being administered by a court, the rule of equitable distribution is applicable to its fullest extent. Where, however, the partners have the possession and control of their own property, they have the right to make any honest disposition of it they see fit; each has the right to waive his equitable lien, and together they may sell, assign or mortgage the property of the firm to pay or secure either an individual debt of one of the partners, or the debts of the firm."

To same effect: Purple v. Farrington (1889), 119 Ind. 164, 25 N. E. Rep. 904, 4 L. R. A. 535; Winslow v. Wallace (1888), 116 Ind. 317, 17 N. E. Rep. 923, 1 L. R. A. 179; Ellison v. Lucas (1891), 87 Ga. 223, 13 S. E. Rep. 445, 27 Am. St. Rep. 242; Smith v. Smith (1893), 87 Iowa, 93, 54 N. W. Rep. 73, 43 Am. St. Rep. 359; Teague v. Lindsey (1895), — Ala. —, 17 So. Rep. 538; Huiskamp v. Moline Wagon Co. (1886), 121 U. S. 310, 30 L. ed. 971, 7 Sup. Ct. Rep. 899; Case v. Beauregard (1878), 99 U. S. 119; Pepper v. Peck (1890), 17 R. I. 55, 20 Atl. Rep. 16; Woodmansie v. Holcomb (1885), 34 Kan. 35, 7 Pac. Rep. 603; Myers v. Tyson (1896), — Kan. —, 43 Pac. Rep. 91; Farwell v. Huston (1894), 151 Ill. 239, 37 N. E. Rep. 864, 42 Am. St. Rep. 237.

[1] Thus, in Case v. Beauregard (1878), 99 U. S. 119, it is said: "The right of each partner extends only to the share of what may remain after payment of the debts of the firm and a settlement of its accounts. Growing out of the right, or rather included in it, is the right to have the partnership property applied to the payment of the partnership debts in preference to those of any individual partner. This is an equity that partners have between themselves, and in certain circumstances it inures to the benefit of the creditors of the firm. The latter are said to have the privilege or preference, some-

court as in case of dissolution, bankruptcy proceedings and the settlement of insolvent estates in courts of equity, a different rule prevails. Acting here upon the presumed intention and desire of each partner that the partnership assets shall be applied to the discharge of the partnership liabilities, the courts apply them first to that purpose, and exclude the individual creditors of the partners from participation until the firm creditors are paid.

So where firm property has been levied upon for the individual debt of one partner, inasmuch as the only interest which can be so sold is the partner's share in the final surplus,[1] such levy must yield priority to subsequent levies for debts due to the firm creditors.[2] And the same result will ensue where one partner has mortgaged or otherwise incumbered his separate interest to secure his separate creditors.[3]

But where all of the partners themselves, while the assets remained under their control, have created valid liens upon the property, the court in administering the estate will give such liens effect.[4]

times loosely denominated a 'lien,' to have the debts due to them paid out of the assets of a firm in course of liquidation to the exclusion of the creditors of its several members. This equity is a derivative one. It is not held or enforceable in their own right. It is practically a subrogation to the equity of the individual partner, to be made effective only through him. Hence, if he is not in a condition to enforce it. the creditors of the firm cannot be. Rice v. Barnard, 20 Vt. 479, 50 Am. Dec. 54; York County Bank's Appeal, 32 Pa. St. 446. But so long as the equity of the partner remains in him — so long as he retains an interest in the firm assets as a partner — a court of equity will allow the creditors of the firm to avail themselves of his equity and enforce through it the application of those assets primarily to the payment of the debts due them whenever the property comes under its administration."

[1] See *ante*, § 100.

[2] Jarvis v. Brooks (1853), 27 N. H. 37, 59 Am. Dec. 359; Conroy v. Woods (1859), 13 Cal. 626, 73 Am. Dec. 605; Bullock v. Hubbard (1863), 23 Cal. 495, 83 Am. Dec. 130; Pierce v. Jackson (1810), 6 Mass. 242, Ames' Partn. Cas. 298.

[3] Ewart v. Mercantile Co. (1895), — Mo. —, 31 S. W. Rep. 1041.

[4] Smith v. Smith (1893), 87 Iowa, 93, 54 N. W. Rep. 73, 43 Am. St. Rep. 359.

§ 290. Same subject — Joint but not partnership creditors not preferred.— The reasons which operate to give firm creditors as such a preference in payment out of firm assets operate to exclude from such priority any who do not stand in that relation. It is consequently held that the joint creditors of the partners as individuals, not being partnership creditors, must be excluded from participation in the partnership assets until the firm creditors are paid.[1]

§ 291. Same subject — Partner cannot compete with firm creditors.— So, if the firm be indebted to one partner, inasmuch as he is himself, as a member of the firm, one of the persons from whom his claim is due, and is therefore at once both debtor and creditor, while as to the claims of strangers against the firm he is a debtor simply, it is clear that he is not strictly a firm creditor within the rule which gives such creditors priority. It is settled, therefore, that he cannot compete with the latter class in securing payment out of the assets of the firm; neither can his own creditors, by virtue of his claim, be permitted to so compete.[2]

An exception to this rule has been made where the firm and the partner were carrying on separate trades, and the claim was due in respect of goods furnished by one to the other as such separate traders.[3]

§ 292. Same subject — One partner's share cannot be reached by his creditors till partners' claims against firm are satisfied.— So, though the share or interest of one partner in the final surplus may, as has been seen, be rendered available to his creditors, it must be kept in mind that that surplus is not ascertained until not only the firm creditors as such are paid, but also not until the claims of the re-

[1] See Forsyth v. Woods (1870), 11 Wall. (U. S.) 484; Second Nat. Bank v. Burt (1883), 93 N. Y. 233; Turner v. Jaycox (1869), 40 N. Y. 470.

[2] See Edison Illuminating Co. v. DeMott (1893), 51 N. J. Eq. 16, 25 Atl. Rep. 952; Ex parte Blythe (1881), 16 Ch. Div. 620.

[3] See Ex parte Sillitoe (1824), 1 Glyn & Jameson, 374, Ames' Cas. on Partn. 428; Ex parte Cook (1831), Montagu, 228, Ames' Cas. on Partn. 432.

spective partners against the firm, as for advances made or money loaned to it, are satisfied. In equity, therefore, the individual creditors of one partner cannot reach his share until the claims of partners against the firm have been satisfied.[1]

§ 293. Individual creditors usually given priority in individual assets of a partner.— The right of the firm creditors to priority of payment out of the firm assets being conceded, it has been urged that the separate creditors of the partner were entitled to a like priority of payment out of the separate assets of the partner, and this right has been maintained by many, perhaps by a majority, of the cases in the United States, following the early English precedents.[2] "The correctness of this rule, however," it was said in a leading case,[3] "has been much controverted, and there has not al-

[1] See Buchan v. Sumner (1847), 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305; Crooker v. Crooker (1863), 52 Me. 267, 83 Am. Dec. 509; Divine v. Mitchum (1844), 4 B. Mon. (Ky.) 488, 41 Am. Dec. 241.

[2] See Hundley v. Farris (1890), 103 Mo. 78, 15 S. W. Rep. 312, 23 Am. St. Rep. 863, 12 L. R. A. 254; Claflin v. Behr (1889), 89 Ala. 508, 8 So. Rep. 45; Moody v. Lucier (1883), 62 N. H. 584; Greene v. Butterworth (1889), 45 N. J. Eq. 738, 17 Atl. Rep. 949; Peters v. Bain (1889), 133 U. S. 670, 10 Sup. Ct. Rep. 354; New Market Nat. Bank v. Locke (1883), 89 Ind. 428; Rodgers v. Meranda (1857), 7 Ohio St. 180, Paige's Partn. Cas. 223.

[3] Rodgers v. Meranda, *supra.*

In Murrill v. Neill (1850), 8 How. (U. S.) 414, it is said: "The rule in equity governing the administration of insolvent partnerships is one of familiar acceptance and practice; it is one which will be found to have been in practice in this country from the beginning of our judicial history, and to have been generally if not universally received. This rule, with one or two eccentric variations in the English practice which may be noted hereafter, is believed to be identical with that prevailing in England, and is this: That partnership creditors shall, in the first instance, be satisfied from the partnership estate; and separate or private creditors of the individual partners from the separate and private estate of the partners with whom they have made private and individual contracts; and that the private and individual property of the partners shall not be applied in extinguishment of partnership debts until the separate and individual creditors of the respective partners shall be paid. The reason and foundation of this rule, or its equality and fairness, the court is

ways been a perfect concurrence in the reasons assigned for it by those courts which have adhered to it. By some, it has been said to be an arbitrary rule, established from considerations of convenience; by others, that it rests on the basis that a primary liability attaches to the fund on which the credit was given — that, in contracts with a partnership, credit is given on the supposed responsibility of the firm; while in contracts with a partner as an individual, reliance is supposed to be placed on his separate responsibility. And again, others have assigned as a reason for the rule that the joint estate is supposed to be benefited to the extent of every credit which is given to the firm, and that the separate estate is, in like manner, presumed to be enlarged by the debts contracted by the individual partner; and that there is consequently a clear equity in confining the creditors, as to preferences, to each estate respectively which has been thus benefited by their transactions. But these reasons are not entirely satisfactory. So important a rule must have a better foundation to stand upon than mere considerations of convenience; and practically it is undeniable that those who give credit to a partnership look to the individual responsibility of the partners as well as that of the firm; and, also, those who contract with a partner in his separate capacity place reliance on his various resources or means, whether individual or joint. And inasmuch as individual debts are often contracted to raise means which are put into the business of a partnership, and also partnership effects often withdrawn from the firm and appropriated to the separate use of the partners, it cannot be practically true that the separate estate has been benefited to the extent of every credit given to each individual partner, nor that the joint estate has retained from the separate estate of each partner the benefit of every credit given to the firm." The court, how-

not called upon to justify. Were these less obvious than they are, it were enough to show the early adoption and general prevalence of this rule to stay the hand of innovation at this day, at least under any motive less strong than the most urgent propriety."

ever, concluded that the rule was well established, saying: "Some general rule is necessary, and that must rest on the basis of the unalterable preference of the partnership creditors in the joint effects, and their further right to some claim in the separate property of each of the several partners. The preference, therefore, of the individual creditors of a partner in the distribution of his separate estate, results as a principle of equity from the preference of partnership creditors in the partnership funds, and their advantage in having different funds to resort to, while the individual creditors have but one." But whether the reasons assigned for the rule are satisfactory or not, the rule itself seems to be established by the clear weight of authority.

§ 294. **Same subject — The contrary view.**— But notwithstanding the quite general concurrence in the rule giving each class of creditors priority in the respective funds, it has met with some forcible dissent,[1] and upon principle it is difficult to be sustained. The true rule, from the standpoint of principle, would seem to be that inasmuch as each partner is individually liable for the partnership debts, the creditors of the firm (and therefore of each partner as well), after exhausting the partnership assets, are entitled to share equally with the separate creditors in the separate assets of the partners. The basis of this rule is found in the fact that the partnership creditor has recourse to *two* funds (*i. e.*, the partnership assets and the individual assets), while the individual creditor has recourse to but *one* fund, namely, the individual assets; and it is a principle of equity that where one creditor has access to two funds while another creditor has access to but one, the former shall exhaust the separate fund before resorting to the common fund.

[1] See Hutzler v. Phillips (1887), 26 S. C. 136, 1 S. E. Rep. 502, 4 Am. St. Rep. 687; Blair v. Black (1889), 31 S. C. 346, 9 S. E. Rep. 1033, 17 Am. St. Rep. 30; Pettyjohn v. Woodruff (1890), 86 Va. 478, 10 S. E. Rep. 715; Camp v. Grant (1851), 21 Conn. 41, 54 Am. Dec. 321, to the effect that partnership creditors may share equally with individual creditors in the separate assets.

§ 295. Same subject — Rules apply only where there are two funds.— But either rule applies only where there are two funds. Thus, where there are no partnership assets and no solvent partner, it is usually held that the partnership creditors may share equally with the individual creditors in the separate assets of the partner.[1]

§ 296. Same subject — Firm cannot compete with individual creditors.— Passing next from the right of firm creditors as such to compete with the individual creditors in the separate estate of one partner, the question arises whether, if that partner was indebted to the firm, the firm or those who represent it can compete with the individual creditors of that partner in the distribution of his assets. As to this, the general rule is that the firm or those who represent it cannot be permitted to compete with the separate creditors of one partner in the distribution of his estate.[2] An exception to the rule exists where the claim of the firm against the partner is founded upon his wrongful and fraudulent appropriation of firm assets to his own use.[3]

§ 297. Same subject — Right of partner to apply individual assets to firm debts.— Whether one partner will be permitted to apply his individual assets to the payment of the firm creditors and thereby exclude his own separate creditors, as by making an assignment for their benefit or

[1] See In re Lloyd (1884), 22 Fed. Rep. 88; In re West (1889), 39 Fed. Rep. 203; Harris v. Peabody (1881), 73 Me. 262; Curtis v. Woodward (1883), 58 Wis. 499, 46 Am. Rep. 647; Alexander v. Gorman (1886), 15 R. I. 421. *Contra*, Howe v. Lawrence (1852), 9 Cush. (Mass.) 553, 57 Am. Dec. 68; Warren v. Farmer (1884), 100 Ind. 593; In re Gray (1888), 111 N. Y. 404.

[2] See Read v. Bailey (1877), 3 App. Cas. 94, Ames' Partn. Cas. 409; In re Hamilton (1880), 1 Fed. Rep. 800; Cowan v. Gill (1883), 11 Lea (Tenn.), 674; Lodge v. Fendal (1790), 1 Vesey, Jr. 166, Ames' Partn. Cas. 394. *Contra*, Bird v. Bird (1885), 77 Me. 499, 1 Atl. Rep. 455.

[3] See Ex parte Sillitoe (1824), 1 Glyn & Jameson, 374, Ames' Cas. on Partn. 428.

giving them the preference in assigning his estate, is a question upon which the authorities are in conflict, as they have been seen to be respecting the right of firm creditors to share equally with the individual creditors in the partner's separate estate.[1] Substantially similar considerations apply to each question. It is said, on the one hand, that inasmuch as the firm creditors are equally creditors of the partners as individuals, there is no reason why the individual partner should not pay them out of his own estate if he so prefers.[2] On the other hand, it is urged that the separate creditors have a first claim upon the separate assets, and to permit them to be diverted to the payment of the firm creditors is a fraud upon the separate creditors.[3] The former would seem to be the better view.

§ 298. **Right of partners to convert firm property into individual property.**— Intimately connected with the questions already considered is that of the power of the partners, by any arrangement among themselves, to so divest themselves of their own lien upon the partnership property that the right of the firm creditors to priority of payment out of that property — which right, as has been seen, depends upon the partners' right — shall be cut off.[4] Thus, for example, may one partner on retiring from the firm sell out all of his interest in the partnership assets to his copartner, who continues the business, in such a way that the latter may thereafter apply those assets to the payment of his individual debts to the exclusion of the firm creditors? May both partners by selling to a third person thus divest their firm creditors of their priorities in the property so sold?

These questions are but another form of that already con-

[1] See *ante*, §§ 285, 286.

[2] See Newman v. Bagley (1835), 16 Pick. (Mass.) 570; Gadsden v. Carson (1857), 9 Rich. Eq. (S. C.) 252; Chessher v. Clam (1895), — Tex. Civ. App. —, 30 S. W. Rep. 466.

[3] See Holton v. Holton (1860), 40 N. H. 77, Ames' Partn. Cas. 332; Jackson v. Cornell (1844), 1 Sandf. (N. Y.) Ch. 34[illegible].

[4] See *ante*, § 283.

sidered, namely, the right of the partners to apply firm assets to the payment of individual debts.[1] They rest upon substantially the same considerations and present substantially the same conflict of opinion. That solvent partners, acting in good faith, may do so, seems to be conceded.[2] That it may also be done, though the partners are not solvent, if done in good faith and for a valuable consideration, has also been held.[3] Whether the mere assumption of the debts by the continuing partner is a sufficient consideration is in question. In a late case[4] it is said: "It is clear that while the partnership is solvent and going on, the partners may, by unanimous assent or joint act, do what they please with the assets, if the act is *bona fide.* Where, in such case, one partner sells or assigns his interest to the other, *bona fide*, for a valuable consideration, or an agreement to pay the debts of the firm, and indemnify against them, this will change the joint into a separate property. The only question is upon the *bona fides* of the transaction. If such an arrangement could not be made, a partner could never retire. On the other hand, according to the better reason and the weight of authority, if the firm is insolvent, or on the eve of insolvency, and both of the partners are insolvent, a purchase by one partner of the interest of the other, in consideration of the former's assumption of all the debts of the firm, will be regarded as a purchase upon a consideration which is of no value whatever; and, no equivalent having been given, the transfer is in effect voluntary, and its only effect, if sustained, would be to hinder partnership creditors, and hence is deemed ineffectual to convert the joint property into separate property as against the firm creditors."

[1] See *ante*, § 288.

[2] See Fulton v. Hughes (1885), 63 Miss. 61; Stanton v. Westover (1886), 101 N. Y. 265; Ketchum v. Durkee (1846), 1 Barb. (N. Y.) Ch. 480, 45 Am. Dec. 412.

[3] See Allen v. Center Valley Co. (1851), 21 Conn. 130, 54 Am. Dec. 333; Howe v. Lawrence (1852), 9 Cush. (Mass.) 553, 57 Am. Dec. 68.

[4] Darby v. Gilligan (1889), 33 W. Va. 246, 10 S. E. Rep. 400, 6 L. R. A. 740, citing many cases.

Another view of similar transactions leading to the same result is that the stipulation that the continuing partner shall pay the debts operates not to release but to continue the selling partner's lien upon the assets, unless expressly waived, and therefore the firm creditors may still work out their priority through his lien, until the property has come into the hands of a *bona fide* purchaser.[1]

§ 299. Application of assets when there was no ostensible partnership — When there was merely an ostensible but not an actual partnership.— Questions as to the proper application of the assets also arise where there was really a partnership between the parties, but there was none ostensibly, as where, of two partners, one was dormant and the other appeared to the public as the sole dealer. "In such a case," say the court in Tennessee,[2] "the ordinary rules touching partnership transactions and partnership property do not apply. The dormant partner has clearly no equity to require the application of the partnership property to the payment of the firm debts to his exoneration, as against the creditors of the ostensible partner who has been dealt with as the sole owner.[3] And the creditors of the firm, who have no equity except such as can be worked out through the dormant partner, cannot require that the partnership property be first applied to the satisfaction of their debts.[4] It is a race of diligence between the two classes of creditors, and equity will not interfere to deprive either of a legal advantage."

The reverse of this case also arises where two persons are ostensibly partners, but are not really such. The rule ap-

[1] See Bulger v. Ross (1890), 119 N. Y. 459, 24 N. E. Rep. 853; Olson v. Morrison (1874), 29 Mich. 395; Thayer v. Humphrey (1895), — Wis. —, 64 N. W. Rep. 1007, 30 L. R. A. 549.

[2] Whitworth v. Patterson (1880), 6 Lea, 119.

[3] Cammack v. Johnson (1839), 2 N. J. Eq. 163.

[4] French v. Chase (1829), 6 Me. 166; Lord v. Baldwin (1828), 6 Pick. (Mass.) 348.

plied here, as declared in a recent case in Wisconsin,[1] is, "that if a person allows another to carry on business in such a way as to amount to a holding out to persons generally that he and such other are partners, and credit is given to both on the supposition that they are partners in fact, the property with which such business is carried on, though in law that of such person, in equity will be treated as the joint property of such person and such other; and neither of them, nor the creditors of either, can prove up in insolvency in competition with the creditors who have trusted the two as partners and the business as that of the two."

§ 300. Equitable rules do not defeat legal priorities.— But these rules of distribution prevailing in courts of equity do not usually operate to defeat priorities previously acquired in legal proceedings. Thus, it has been held that the lien of a judgment, rendered after the death of one partner, but for a partnership debt, and attaching to the individual real estate of the surviving partner, will not be disturbed in favor of a later judgment against such survivor for his individual debt, even though such later judgment cannot otherwise be satisfied, and it was alleged that the prior one might have been satisfied out of the estate of the deceased partner.[2] Selden, J., after referring to the rule prevailing in courts of equity, as already noticed, said: "This, however, is a rule which prevails in courts of equity in the distribution of equitable assets only. Those courts have never assumed to exercise the power of setting aside, or in any way interfering with, an absolute right of priority obtained at law. In regard to all such cases the rule is, *Equitas sequitur legem.*"

So where the individual credits of one partner had been attached at the suit of the firm creditors and were subse-

[1] Thayer v. Humphrey (1895), 91 Wis. 276, 64 N. W. Rep. 1007, 30 L. R. A. 549. To same effect: Van Kleeck v. McCabe (1891), 87 Mich. 599, 49 N. W. Rep. 872, 24 Am. St. Rep. 182.

[2] Meech v. Allen (1858), 17 N. Y. 300, 72 Am. Dec. 465, Ames' Cas. on Partn. 326.

quently attached by his individual creditor, it was held that the prior lien was effectual.[1] The court said that it was settled law in Massachusetts, though otherwise in New Hampshire, that "in a suit against two or more copartners upon their joint debt, the separate property of any one of the partners may be attached, and the lien so acquired is not discharged or impaired by a subsequent attachment of the same property upon a suit in favor of a separate creditor of the same partner."

[1] Stevens v. Perry (1873), 113 Mass. 380, Ames' Cas. on Partn. 330. To like effect: Allen v. Wells (1839), 22 Pick. (Mass.) 450, 33 Am. Dec. 757.

CHAPTER XX.

OF THE FINAL ACCOUNTING.

§ **301. Necessity of accounting.**— Upon the termination of the partnership, either by the act of the parties or the act of law, an accounting becomes necessary. If the firm is solvent, and the partners agree, they may close up their affairs, pay their debts and distribute the surplus, by their own act; but if they cannot agree, or if the firm is insolvent and there are conflicting claims, an accounting in court becomes necessary. As has been already seen,[1] the court of equity is the forum in which partnership accounts are to be settled, and something has been already said as to who is entitled to demand an accounting.[2] It has been sometimes said that the right to demand an accounting is a test of being a partner, but the true theory seems to be that the right to an accounting follows because one is a partner

§ **302. Basis of the accounting.**— It has been seen[3] that it is the duty of each partner to keep full and accurate accounts of his partnership transactions, and that if he fails to do so, every uncertainty resulting therefrom will be resolved against him. It has been seen also[4] that all profits and advantages resulting from firm transactions must be accounted for, even though done in the name of one part-

[1] *Ante*, § 153.
[2] *Ante*, § 154.
[3] See *ante*, § 116.
[4] *Ante*, § 112.

ner only; and that a partner is not entitled to extra compensation or interest in the absence of an agreement to pay it.[1] It has been seen, moreover, that the claims of partners for contribution as to debts paid, for reimbursement for advances, for indemnity against liability, and most other claims and demands arising between the partners themselves, are to be settled upon the final accounting.[2] Such an accounting becomes, therefore, the one great occasion for a comprehensive and effective settlement of partnership demands, between the partners.

§ 303. Same subject — Right of general creditors to present their demands.— But the claims of the partners as between themselves are not the only ones to be adjusted on the accounting. The claims of firm creditors are also to be ascertained and paid, and they may be presented for that purpose and proven without the commencement of separate actions to enforce them.

A sale of the partnership assets is then to be made, and is practically a matter of course, unless for special reason shown some other method of disposition is ordered.

When the assets have thus been reduced to an available and distributable form, and the claims of the partners among themselves and of creditors against the firm have been ascertained, the estate is ready for distribution among those entitled according to the priorities which the law establishes.

§ 304. Partnership debts to be first paid.— It follows from what has been said as to the application of the firm assets[3] that the partnership debts are to be paid first, and that claims of the individual partners against the firm or each other cannot compete with the claims of the firm creditors. It is thus said to be a general rule that by no form of claim can one partner compete with the firm creditors in the distribution of the firm assets.[4]

[1] *Ante*, §§ 119, 120.

[2] *Ante*, § 127.

[3] See *ante*, §§ 289, 291.

[4] See Edison Illuminating Co. v.

§ 305. Manner of accounting.— Mr. Justice Lindley lays down the following rules,[1] which have been generally adopted, as to the manner of accounting: "In adjusting the accounts of partners, losses ought to be paid first out of assets excluding capital, next out of capital, and lastly by having recourse to the partners individually; and the assets of the partnership should be applied as follows:

"1. In paying the debts and liabilities of the firm to non-partners.

"2. In paying to each partner ratably what is due from the firm to him for advances as distinguished from capital.

"3. In paying to each partner ratably what is due from the firm to him in respect of capital.

"4. The ultimate residue, if any, will then be divisible as profit between the partners in equal shares, unless the contrary be shown."

§ 306. Same subject.—"If the assets are not sufficient to pay the debts and liabilities to non-partners," continues Mr. Justice Lindley, "the partners must treat the difference as a loss and make it up by contributions *inter se*. If the assets are more than sufficient to pay the debts and liabilities of the partnership to non-partners, but are not sufficient to repay the partners their respective advances, the amount of unpaid advances ought, it is conceived, to be treated as a loss to be met like other losses. In such a case the advances ought to be treated as a debt of the firm, but payable to one of the partners instead of to a stranger. If, after paying all the debts and liabilities of the firm and the advances of the partners, there is still a surplus, but not sufficient to pay each partner his capital, the balances of capitals remaining unpaid must be treated as so many losses, to be met like other losses."

DeMott (1893), 51 N. J. Eq. 16, 25 Atl. Rep. 952; Ex parte Blythe (1881), 16 Ch. Div. 620.

[1] 2 Lindley on Partnership, 402 (Ewell's 2d Am. ed).

§ 307. Same subject — Loss of capital, how borne.— "In the absence of controlling agreement," said the court in a leading case,[1] "partners must bear the losses in the same proportion as the profits of the partnership, even if one contributes the whole capital and the other nothing but his labor or services. Whether a loss of capital is a partnership loss, to be borne by all the partners, depends upon the nature and extent of the contract of partnership.

"If, as is not infrequently the case in a partnership for a single adventure, the mere use of the capital is contributed by one partner, and the partnership is in the profits and losses only, the capital remains the property of the individual partner to whom it originally belonged, any loss or destruction of it falls upon him as the owner, and, as it never becomes the property of the partnership, the partnership owes him nothing in consideration thereof.

"But where, as is usual in an ordinary mercantile partnership, a partnership is created not merely in profits and losses, but in the property itself, the property is transferred from the original owners to the partnership and becomes the joint property of the latter; a corresponding obligation arises on the part of the partnership to pay the value thereof to the individuals who originally contributed it; such payment cannot, indeed, be demanded during the continuance of the partnership, nor are the contributors, in the absence of agreement or usage, entitled to interest; but, if the assets of the partnership upon a final settlement are insufficient to satisfy this obligation, all the partners must bear it in the same proportion as other debts of the partnership."

§ 308. Same subject.— In accordance with these principles, it is held that where one partner contributes experience and the other money, the former is not, upon dissolution, entitled to any part of the cash capital, but each takes back what he put in — one his experience, and the other his money.[2] If, however, where one contributes labor and the

[1] Whitcomb v. Converse (1875), 119 Mass. 38, 20 Am. Rep. 311.

[2] Shea v. Donahue (1885), 15 Lea (Tenn.), 160, 54 Am. Rep. 407; Con-

other money, there is, upon dissolution, a loss of capital, the one who contributed his labor must aid in making good the loss of the other who contributed money.[1]

In making contribution at law, the loss is divided equally among the whole number, without regard to their solvency or insolvency; but in equity the loss is made to rest upon the solvent partners alone.[2]

§ 309. Opening and restating accounts.— When once a partnership account has been settled, it will not be easily disturbed, particularly if much time has elapsed. Still, even after long acquiescence, an account may be reopened and corrected if fraud was practiced in the first accounting; and, within a reasonable time, an account may be reopened for the correction of errors or omissions. The fraud, however, must be clearly stated and proved, and the mistake or omission must be as to some matter not known to the complaining party at the time it was committed.[3]

roy v. Campbell, 18 Jones & Sp. (N. Y.) 326.

[1] Whitcomb v. Converse, *supra*.

[2] Whitcomb v. Converse, *supra*; 1 Lindley on Partnership (Ewell's 2d Am. ed.), 376.

[3] See Claflin v. Bennett (1892), 51 Fed. Rep. 693; Valentine v. Wysor (1890), 123 Ind. 47, 23 N. E. Rep. 1076, 7 L. R. A. 788; Merriwether v. Hardeman (1879), 51 Tex. 436; Varner's Appeal (18—), 2 Monaghan (Pa.), 228; Cobb v. Cole (1890), 44 Minn. 278, 46 N. W. Rep. 364; King v. White (1890), 63 Vt. 158, 21 Atl. Rep. 535, 25 Am. St. Rep. 758.

CHAPTER XXI.

OF LIMITED PARTNERSHIPS.

§ 310. **Of the nature of such partnerships.**— Something has been already said in relation to these partnerships,[1] but they require a little fuller consideration. The purpose of such organizations is to permit the formation of partnerships in which some of the partners who manage the business shall have the general personal liability of ordinary partners, while other of the partners who take no part in the management may contribute a given amount of capital and assume no liability beyond the amount so contributed.

§ 311. **Must be authorized by statute.**— Partnerships of this nature can be organized only when permitted by statute, but statutes have been enacted for this purpose in the majority of the states.

§ 312. **The usual statutory requirements.**— The statutory provisions are not entirely uniform, but they are substantially so. They require usually the execution of a certificate which shall set forth who the partners are, with their residence; who are to be the general partners, and who the special partners; the name under which the partnership is to do business; the amount of capital actually contributed

[1] *Ante*, § 7.

by the special partners; the business to be conducted, and the date at which the partnership is to begin and end.

This statement or certificate is to be published for a designated period, and is also to be recorded in some specified public office.

The names of all the general partners must usually appear in the firm name (though the statutes are not uniform on this point), but the names of the special partners must not appear. Where the names of all the general partners are required to be in the firm name, there must usually be no such addition as "& Co.," indicating that there are other general partners. They are sometimes required to add the word "limited" to the firm name.

The contribution of the special partners is usually required to be in cash, and when this is the requirement the courts are very strict in refusing to recognize anything but cash as sufficient.[1]

§ 313. **Necessity for compliance with requirements.**— Inasmuch as the effect of such organizations is to restrict the ordinary liabilities of partners, it is held that there must be at least a substantially full and exact compliance with the statutory requirements.[2]

And since it is only by force of the statute that the limited liability is secured, it follows that a failure to comply with the statutory requirements will render the special partners liable to third persons like general partners.[3] As is

[1] See Lineweaver v. Slagle (1885), 64 Md. 465, 54 Am. Rep. 775; In re Allen (1889), 41 Minn. 430, 43 N. W. Rep. 382.

[2] See Selden v. Hall (1886), 21 Mo. App. 452; White v. Eiseman (1892), 134 N. Y. 101, 31 N. E. Rep. 276; Lineweaver v. Slagle (1885), 64 Md. 465, 54 Am. Rep. 775, 2 Atl. Rep. 693; Haddock v. Grinnell Mfg. Co. (1885), 109 Pa. St. 372, 1 Atl. Rep. 174.

[3] See Sheble v. Strong (1889), 128 Pa. St. 315, 18 Atl. Rep. 397; Vanhorn v. Corcoran (1889), 127 Pa. St. 255, 4 L. R. A. 386, 18 Atl. Rep. 16; Manhattan Co. v. Laimbeer (1888), 108 N. Y. 578, 15 N. E. Rep. 712; Briar Hill C. & I. Co. v. Atlas Works (1891), 146 Pa. St. 290, 23 Atl. Rep. 326.

said in a recent case,[1] "*prima facie*, a firm transacting business is a general partnership. . . . A limited partnership that has not complied with the law of its creation is not a limited partnership at all. It is, however, a partnership in which all the members are liable as at common law."

§ 314. **For what business authorized.**—In many of the states no restrictions are placed upon the kind of business that may be carried on by a special partnership; in others certain kinds of business, usually insurance and banking, are excepted.

§ 315. **Conduct of business.**— The general partners alone represent the firm and carry on its business. If the special partner takes part in its management he becomes liable as a general partner. Contracts must therefore be made by and in the name of the general partners, and suits must be brought by and against them.[2]

§ 316. **Dissolution and notice.**— The partnership may be renewed by a renewal of the certificate, publication and record. Otherwise it comes to an end as a limited partnership at the time designated, and if continued afterward it will be as a general partnership. It may also be terminated before by operation of law or the act of the partners, like general partnerships. Where it is so terminated before the time limited has expired, and no statutory provision for no-

[1] Blumenthal v. Whitaker (1895), 170 Pa. St. 309, 33 Atl. Rep. 103. The statutes themselves often provide that a false statement in the certificate shall defeat the limited liability. Sheble v. Strong, *supra;* Durant v. Abendroth (1877), 69 N. Y. 148, 25 Am. Rep. 158. But the failure of the recording officer to properly record will not usually defeat it (Manhattan Co. v. Laimbeer, *supra*), unless the party was himself in fault. Henkel v. Heyman (1878), 91 Ill. 96.

[2] See Columbia Land and Cattle Co. v. Daly (1891), 46 Kan. 504, 26 Pac. Rep. 1042; Sharp v. Hutchinson (1885), 100 N. Y. 533; Jaffe v. Krum (1885), 88 Mo. 669.

tice is made, notice must usually be given in the same cases and manner as upon the dissolution of a general partnership; though where it is terminated by the act of the partner before the expiration of the stipulated term, the statutes usually require that notice shall be published and recorded like the original certificate. Where it comes to an end by expiration of the time fixed, no notice is necessary, as the published and recorded certificate gives notice to all the world.

APPENDIX A.

THE ENGLISH PARTNERSHIP ACT, 1890.

(53 & 54 Vict., ch. 39.)

An Act to declare and amend the Law of Partnership.

(14th August, 1890.)

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. (1) Partnership is the relation which subsists between persons carrying on a business in common with a view of profit.

(2) But the relation between members of any company or association which is —

(a) Registered as a company under the Companies Act, 1862, or any other Act of Parliament for the time being in force and relating to the registration of joint-stock companies; or

(b) Formed or incorporated by or in pursuance of any other Act of Parliament or letters patent, or Royal Charter; or

(c) A company engaged in working mines within and subject to the jurisdiction of the Stannaries:

is not a partnership within the meaning of this Act.

2. In determining whether a partnership does or does not exist, regard shall be had to the following rules:

(1) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether

the tenants or owners do or do not share any profits made by the use thereof.

(2) The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived.

(3) The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business, but the receipt of such a share or of a payment contingent on or varying with the profits of a business does not of itself make him a partner in the business; and in particular —

(a) The receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such.

(b) A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such.

(c) A person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such.

(d) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such. Provided that the contract is in writing and signed by or on behalf of all the parties thereto.

(e) A person receiving by way of annuity or other-

wise a portion of the profits of a business in consideration of the sale by him of the good-will of the business is not by reason only of such receipt a partner in the business or liable as such.

3. In the event of any person to whom money has been advanced by way of loan upon such a contract as is mentioned in the last foregoing section, or of any buyer of a good-will in consideration of a share of the profits of the business, being adjudged a bankrupt, entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of the loan shall not be entitled to recover anything in respect of his loan, and the seller of the good-will shall not be entitled to recover anything in respect of the share of profits contracted for, until the claims of the other creditors of the borrower or buyer for valuable consideration in money or money's worth have been satisfied.

4. (1) Persons who have entered into partnership with one another are for the purposes of this Act called collectively a firm, and the name under which their business is carried on is called the firm name.

(2) In Scotland a firm is a legal person distinct from the partners of whom it is composed, but an individual partner may be charged on a decree or diligence directed against the firm, and on payment of the debts is entitled to relief *pro rata* from the firm and its other members.

5. Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member, bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner.

6. An act or instrument relating to the business of the firm and done or executed in the firm name, or in any other

manner showing an intention to bind the firm, by any person thereto authorized, whether a partner or not, is binding on the firm and all the partners.

Provided that this section shall not affect any general rule of law relating to the execution of deeds or negotiable instruments.

7. Where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business the firm is not bound, unless he is in fact specially authorized by the other partners; but this section does not affect any personal liability incurred by an individual partner.

8. If it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement.

9. Every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied, but subject in England or Ireland to the prior payment of his separate debts.

10. Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his copartners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.

11. In the following cases, namely:

(a) Where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it; and

(b) Where a firm in the course of its business receives money or property of a third person, and the money or

property so received is misapplied by one or more of the partners while it is in the custody of the firm;

the firm is liable to make good the loss.

12. Every partner is liable jointly with his copartners and also severally for everything for which the firm while he is a partner therein becomes liable under either of the two last preceding sections.

13. If a partner, being a trustee, improperly employs trust property in the business or on the account of the partnership, no other partner is liable for the trust property to the persons beneficially interested therein.

Provided as follows:

(1) This section shall not affect any liability incurred by any partner by reason of his having notice of a breach of trust; and

(2) Nothing in this section shall prevent trust money from being followed and recovered from the firm if still in its possession or under its control.

14. (1) Every one who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made.

(2) Provided that where after a partner's death the partnership business is continued in the old firm name, the continued use of that name or of the deceased partner's name as a part thereof shall not of itself make his executors' or administrators' estate or effects liable for any partnership debts contracted after his death.

15. An admission or representation made by any partner concerning the partnership affairs, and in the ordinary course of its business, is evidence against the firm.

16. Notice to any partner who habitually acts in the partnership business of any matter relating to partnership affairs operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.

17. (1) A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner.

(2) A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement.

(3) A retiring partner may be discharged from any existing liabilities by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted.

18. A continuing guaranty or cautionary obligation given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guaranty or obligation was given.

19. The mutual rights and duties of partners, whether ascertained by agreement or defined by this Act, may be varied by the consent of all the partners, and such consent may be either express or inferred from a course of dealing.

20. (1) All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, are called in this Act partnership property, and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement.

(2) Provided that the legal estate or interest in any land,

or in Scotland the title to and interest in any heritable estate, which belongs to the partnership, shall devolve according to the nature and tenure thereof, and the general rules of law thereto applicable, but in trust, so far as necessary, for the persons beneficially interested in the land under this section.

(3) Where co-owners of an estate or interest in any land, or in Scotland in any heritable estate, not being itself partnership property, are partners as to profits made by the use of that land or estate, and purchase other land or estate out of the profits to be used in like manner, the land or estate so purchased belongs to them, in the absence of an agreement to the contrary, not as partners, but as co-owners for the same respective estates and interests as are held by them in the land or estate first mentioned at the date of the purchase.

21. Unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm.

22. Where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased partner and his executors or administrators, as personal or movable, and not real or heritable estate.

23. (1) After the commencement of this Act, a writ of execution shall not issue against any partnership property, except on a judgment against the firm.

(2) The high court, or a judge thereof, or the chancery court of the county palatine of Lancaster, or a county court, may, on the application by summons of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon, and may by the same or a subsequent order appoint a receiver of that partner's share of profits (whether

already declared or accruing), and of any other money which may be coming to him in respect of the partnership, and direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favor of the judgment creditor by the partner, or which the circumstances of the case may require.

(3) The other partner or partners shall be at liberty at any time to redeem the interest charged, or, in case of a sale being directed, to purchase the same.

(4) This section shall apply in the case of a cost-book company as if the company were a partnership within the meaning of this Act.

(5) This section shall not apply to Scotland.

24. The interests of partners in the partnership property and their rights and duties in relation to the partnership shall be determined, subject to any agreement, express or implied, between the partners, by the following rules:

(1) All the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses, whether of capital or otherwise, sustained by the firm.

(2) The firm must indemnify every partner in respect of payments made and personal liabilities incurred by him —

(a) In the ordinary and proper conduct of the business of the firm; or,

(b) In or about anything necessarily done for the preservation of the business or property of the firm.

(3) A partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital which he has agreed to subscribe, is entitled to interest at the rate of five per cent. per annum from the date of the payment or advance.

(4) A partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him.

(5) Every partner may take part in the management of the partnership business.

(6) No partner shall be entitled to remuneration for acting in the partnership business.

(7) No person may be introduced as a partner without the consent of all existing partners.

(8) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners.

(9) The partnership books are to be kept at the place of business of the partnership (or the principal place, if there is more than one), and every partner may, when he thinks fit, have access to and inspect and copy any of them.

25. No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners.

26. (1) Where no fixed term has been agreed upon for the duration of the partnership, any partner may determine the partnership at any time on giving notice of his intention so to do to all the other partners.

(2) Where the partnership has originally been constituted by deed, a notice in writing, signed by the partner giving it, shall be sufficient for this purpose.

27. (1) Where a partnership entered into for a fixed term is continued after the term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will.

(2) A continuance of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is presumed to be a continuance of the partnership.

28. Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives.

29. (1) Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or from any use by him of the partnership property, name or business connection.

(2) This section applies also to transactions undertaken after a partnership has been dissolved by the death of a partner, and before the affairs thereof have been completely wound up, either by any surviving partner or by the representatives of the deceased partner.

30. If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business.

31. (1) An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners.

(2) In case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.

32. Subject to any agreement between the partners, a partnership is dissolved —

(a) If entered into for a fixed term, by the expiration of that term.

(b) If entered into for a single adventure or undertaking, by the termination of that adventure or undertaking.

(c) If entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership.

In the last-mentioned case the partnership is dissolved as from the date mentioned in the notice as the date of dissolution, or, if no date is so mentioned, as from the date of the communication of the notice.

33. (1) Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner.

(2) A partnership may, at the option of the other partners, be dissolved if any partner suffers his share of the partnership property to be charged under this Act for his separate debt.

34. A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership.

35. On application by a partner the court may decree a dissolution of the partnership in any of the following cases:

(a) When a partner is found lunatic by inquisition, or in Scotland by cognition, or is shown to the satisfaction of the court to be of permanently unsound mind, in either of which cases the application may be made as well on behalf of that partner by his committee or next friend or person having title to intervene as by any other partner.

(b) When a partner, other than the partner suing, becomes in any other way permanently incapable of performing his part of the partnership contract.

(c) When a partner, other than the partner suing, has been guilty of such conduct as, in the opinion of the court, regard being had to the nature of the business, is

calculated to prejudicially affect the carrying on of the business.

(d) When a partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partner or parners to carry on the business in partnership with him.

(e) When the business of the partnership can only be carried on at a loss.

(f) Whenever in any case circumstances have arisen which in the opinion of the court render it just and equitable that the partnership be dissolved.

36. (1) Where a person deals with a firm after a change in its constitution, he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change.

(2) An advertisement in the London Gazette as to a firm whose principal place of business is in England or Wales; in the Edinburgh Gazette as to a firm whose principal place of business is in Scotland, and in the Dublin Gazette as to a firm whose principal place of business is in Ireland, shall be notice as to persons who had not dealings with the firm before the date of the dissolution or change so advertised.

(3) The estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy or retirement respectively.

37. On the dissolution of a partnership or retirement of a partner, any partner may publicly notify the same, and may require the other partner or partners to concur for that purpose in all necessary or proper acts, if any, which cannot be done without his or their concurrence.

38. After the dissolution of a partnership, the authority of each partner to bind the firm, and the other rights and

obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise.

Provided that the firm is in no case bound by the acts of a partner who has become bankrupt; but this proviso does not affect the liability of any person who has, after the bankruptcy, represented himself, or knowingly suffered himself to be represented, as a partner of the bankrupt.

39. On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may on the termination of the partnership apply to the court to wind up the business and affairs of the firm.

40. Where one partner has paid a premium to another on entering into a partnership for a fixed term, and the partnership is dissolved before the expiration of that term otherwise than by the death of a partner, the court may order the repayment of the premium, or of such part thereof as it thinks just, having regard to the terms of the partnership contract and to the length of time during which the partnership has continued; unless

(a) The dissolution is, in the judgment of the court, wholly or chiefly due to the misconduct of the partner who paid the premium, or

(b) The partnership has been dissolved by an agreement containing no provision for a return of any part of the premium.

41. Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the par-

ties thereto, the party entitled to rescind is, without prejudice to any other right, entitled —

(a) to a lien on, or right of retention of, the surplus of the partnership assets, after satisfying the partnership liabilities, for any sum of money paid by him for the purchase of a share in the partnership, and for any capital contributed by him, and is

(b) to stand in the place of the creditors of the firm for any payments made by him in respect of the partnership liabilities, and

(c) to be indemnified by the person guilty of the fraud or making the representation against all the debts and liabilities of the firm.

42. (1) Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of five per cent. per annum on the amount of his share of the partnership assets.

(2) Provided that where by the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section.

43. Subject to any agreement between the partners, the amount due from surviving or continuing partners to an out-

going partner or the representatives of a deceased partner in respect of the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or death.

44. In settling accounts between the partners after a dissolution of partnership, the following rules shall, subject to any agreement, be observed:

(a) Losses, including losses and deficiencies of capital, shall be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits.

(b) The assets of the firm, including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, shall be applied in the following manner and order:

(1) In paying the debts and liabilities of the firm to persons who are not partners therein.

(2) In paying to each partner, ratably, what is due from the firm to him for advances as distinguished from capital.

(3) In paying to each partner, ratably, what is due from the firm to him in respect of capital.

(4) The ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible.

45. In this Act, unless the contrary intention appears—

The expression "court" includes every court and judge having jurisdiction in the case.

The expression "business" includes every trade, occupation or profession.

46. The rules of equity and of common law applicable to partnership shall continue in force except so far as they are inconsistent with the express provisions of this Act.

47. (1) In the application of this Act to Scotland the bankruptcy of a firm or of an individual shall mean sequestration under the Bankruptcy (Scotland) Acts, and also in the case of an individual the issue against him of a degree of *cessio bonorum*.

(2) Nothing in this Act shall alter the rules of the law of Scotland relating to the bankruptcy of a firm or of the individual partners thereof.

48. The Acts mentioned in the schedule to this Act are hereby repealed to the extent mentioned in the third column of that schedule.

49. This Act shall come into operation on the first day of January, one thousand eight hundred and ninety-one.

50. This Act may be cited as the Partnership Act, 1890

AMERICAN CODES.

The following are the sections of the California code upon the subject of Partnership. It has been re-enacted in Dakota and Montana with such variations as are noted.

Article I.

WHAT CONSTITUTES A PARTNERSHIP.

SEC. 2395. Partnership is the association of two or more persons for the purpose of carrying on business together, and dividing its profits between them.

SEC. 2396. Part owners of a ship do not, by simply using it in a joint enterprise, become partners as to the ship. (Not in Montana statutes.)

SEC. 2397. A partnership can be founded only by the consent of all the parties thereto, and therefore no new partner can be admitted to the partnership without the consent of every existing member thereof.

Article II.

PARTNERSHIP PROPERTY.

SEC. 2401. The property of a partnership consists of all that is contributed to the common stock at the formation of the partnership, and all that is subsequently acquired thereby.

SEC. 2402. The interest of each member of a partnership extends to every portion of its property.

SEC. 2403. In the absence of any agreement on the subject, the shares of partners in the profit or loss of the business are equal, and the share of each in the partnership

property is the value of his original contribution, increased or diminished by his share of profit or loss.

SEC. 2404. An agreement to divide the profits of a business implies an agreement for a corresponding division of its losses, unless it is otherwise expressly stipulated.

SEC. 2405. Each member of a partnership may require its property to be applied to the discharge of its debts, and has a lien upon the shares of the other partners for this purpose, and for the payment of the general balance, if any, due to him.

SEC. 2406. Property, whether real or personal, acquired with partnership funds, is presumed to be partnership property.

ARTICLE III.

MUTUAL OBLIGATIONS OF PARTNERS.

SEC. 2410. The relations of partners are confidential. They are trustees for each other within the meaning of chapter I of the title on trusts, and their obligations as such trustees are defined by that chapter.

SEC. 2411. In all proceedings connected with the formation, conduct, dissolution and liquidation of a partnership, every partner is bound to act in the highest good faith toward his copartners. He may not obtain any advantage over them in the partnership affairs by the slightest misrepresentation, concealment, threat or adverse pressure of any kind.

SEC. 2412. Each member of a partnership must account to it for everything that he receives on account thereof, and is entitled to reimbursement therefrom for everything that he properly expends for the benefit thereof, and to be indemnified thereby for all losses and risks which he necessarily incurs on its behalf.

SEC. 2413. A partner is not entitled to any compensation for services rendered by him to the partnership. (In Montana statutes the following is added:—"unless there is an agreement to that effect.")

ARTICLE IV.

RENUNCIATION OF PARTNERSHIP.

SEC. 2417. A partner may exonerate himself from all future liability to a third person on account of the partnership by renouncing in good faith all participation in its future profits, and giving notice to such third person and to his own copartners that he has made such renunciation, and that so far as may be in his power he dissolves the partnership and does not intend to be liable on account thereof for the future.

SEC. 2418. After a partner has given notice of his renunciation of the partnership he cannot claim any of its subsequent profits, and his copartners may proceed to dissolve the partnership.

CHAPTER II.

ARTICLE I.

WHAT IS A GENERAL PARTNERSHIP.

SEC. 2424. Every partnership that is now formed in accordance with the law concerning special or mining partnerships, and every special partnership so far only as the general partners are concerned, is a general partnership.

ARTICLE II.

POWERS AND AUTHORITY OF PARTNERS.

SEC. 2428. Unless otherwise expressly stipulated, the decision of the majority of the members of a general partnership binds it in the conduct of its business.

SEC. 2429. Every general partner is agent for the partnership in the transaction of its business, and has authority to do whatever is necessary to carry on such business in the ordinary manner, and for this purpose may bind his copartners by an agreement in writing.

SEC. 2430. A partner, as such, has not authority to do any of the following acts, unless his partners have wholly abandoned the business to him, or are incapable of acting:

1. To make an assignment of the partnership property or any portion thereof to a creditor, or to a third person in trust for the benefit of a creditor or of all creditors.

2. To dispose of the good-will of the business.

3. To dispose of the whole of the partnership property at once, *unless it consists entirely of merchandise.* (The italicised part of last clause is not in the Montana statute.)

4. To do any act which would make it impossible to carry on the ordinary business of the partnership.

5. To confess a judgment.

6. To submit a partnership claim to arbitration.

7. To do any other act not within the scope of the preceding section.

SEC. 2431. A partner is not bound by any act of a copartner in bad faith toward him, though within the scope of the partner's powers, except in favor of persons who have in good faith parted with value in reliance upon such act.

ARTICLE III.

MUTUAL OBLIGATIONS OF PARTNERS.

SEC. 2435. All profits made by a general partnership, in the course of any business usually carried on by the partnership, belong to the firm.

SEC. 2436. A general partner, who agrees to give his personal attention to the business of the partnership, may not engage in any business which gives him an interest adverse to that of the partnership, or which prevents him from giving to such business all the attention which would be advantageous to it.

SEC. 2437. A partner may engage in any separate business, except as otherwise provided by the last two sections.

SEC. 2438. A general partner transacting business contrary to the provisions of this article may be required by

any copartner to account to the partnership for the profits of such business.

Article IV.

LIABILITIES OF PARTNERS.

Sec. 2442. Every general partner is liable to third persons for all the obligations of the partnership, jointly with his copartners.

Sec. 2443. The liability of general partners for each other's acts is defined by the title on agency.

Sec. 2444. Any one permitting himself to be represented as a partner, general or special, is liable, as such, to third persons to whom such representation is communicated, and who, on the faith thereof, give credit to the partnership.

Sec. 2445. No one is liable as a partner who is not such in fact, except as provided in the last section.

Article V.

TERMINATION OF PARTNERSHIP.

Sec. 2449. If no term is prescribed by agreement for its duration, a general partnership continues until dissolved by a partner or by operation of law.

Sec. 2450. A general partnership is dissolved as to all the partners:

1. By lapse of the time prescribed by agreement for its duration.
2. By the expressed will of any partner, if there is no such agreement.
3. By the death of a partner.
4. By a transfer to a person, not a partner, of the interest of any partner in the partnership property.
5. By war, or the prohibition of commercial intercourse between the country in which one partner resides and that in which another resides; or,
6. By a judgment of dissolution.

SEC. 2451. A general partnership may be dissolved, as to himself only, by the expressed will of any partner, notwithstanding his agreement for its continuance; subject, however, to liability to his copartners for any damage caused to them thereby, unless the circumstances are such as entitle him to a judgment of dissolution.

SEC. 2452. A general partner is entitled to a judgment of dissolution:

1. When he, or another partner, becomes legally incapable of contracting.

2. When another partner fails to perform his duties under the agreement of partnership, or is guilty of serious misconduct; or,

3. When the business of the partnership can be carried on only by a permanent loss.

SEC. 2453. The liability of a general partner for the acts of his copartners continues, even after a dissolution of the copartnership, in favor of persons who have had dealings with and given credit to the partnership during its existence, until they have had personal notice of the dissolution; and in favor of other persons until such dissolution has been advertised in a newspaper published in every county where the partnership, at the time of its dissolution, had a place of business, if a newspaper is there published, to the extent in either case to which such persons part with value in good faith, and in the belief that such partner is still a member of the firm.

SEC. 2454. A change of the partnership name, which plainly indicates the withdrawal of a partner, is sufficient notice of the fact of such withdrawal to all persons to whom it is communicated; but a change in the name, which does not contain such an indication, is not notice of the withdrawal of any partner.

Article VI.

LIQUIDATION.

Sec. 2458. After the dissolution of a partnership, the powers and authority of the partners are such only as are prescribed by this article.

Sec. 2459. Any member of a general partnership may act in liquidation of its affairs, except as provided by the next section.

Sec. 2460. If the liquidation of a partnership is committed, by consent of all the partners, to one or more of them, the others have no right to act therein; but their acts are valid in favor of persons parting with value, in good faith, upon credit thereof.

Sec. 2461. A partner authorized to act in liquidation may collect, compromise or release any debts due to the partnership, pay or compromise any claims against it, and dispose of partnership property.

Sec. 2462. A partner authorized to act in liquidation may indorse, in the name of the firm, promissory notes, or other obligations held by the partnership, for the purpose of collecting the same, but he cannot create any new obligation in its name, or revive a debt against the firm, by an acknowledgment, when an action thereon is barred under the provisions of the code of civil procedure.

Article VII.

OF THE USE OF FICTITIOUS NAMES.

Sec. 2466. *Except as otherwise provided in the next section*, every partnership transacting business in this state under a fictitious name, or a designation not showing the names of the persons interested as partners in such business, must file with the clerk of the county in which its principal place of business is situated a certificate stating the names in full of

all the members of such partnership and their places of residence, and publish the same once a week for four successive weeks, in a newspaper published in the county, if there be one, and if there be none, in such county, then in a newspaper published in an adjoining county. (In Montana statute the preceding italicised clause and section 2467 are omitted.)

SEC. 2467. A commercial or banking partnership, established and transacting business in a place without the United States, may, without filing the certificate, or making the publication prescribed in the last section, use in this state the partnership name used by it there, although it be fictitious, or does not show the names of the persons interested as partners in such business.

SEC. 2468. The certificate filed with the clerk, as provided in section 2466, must be signed by the partners, and acknowledged before some officer authorized to take the acknowledgment of conveyances of real property. Where the partnership is hereafter formed, the certificate must be filed, and the publication designated in that section must be made within one month after the formation of the partnership, or within one month from the time designated in the agreement of its members for the commencement of the partnership; where the partnership has been heretofore formed, the certificate must be filed and the publication made within six months after the passage of this act. Persons doing business as partners contrary to the provision of this article shall not maintain any action upon or on account of any contracts made or transactions had in their partnership name, in any court in this state, until they have first filed the certificate and made the publication herein required.

SEC. 2469. On every change in the members of a partnership transacting business in this state under a fictitious name, or a designation which does not show the names of the persons interested as partners in its business, except in the case mentioned in section 2467, a new certificate must

be filed with the county clerk, and a new publication made, as required by this article on the formation of such partnership.

SEC. 2470. Every county clerk must keep a register of the names of firms and persons mentioned in the certificates filed with him, pursuant to this article, entering in alphabetical order the name of every such partnership, and of each partner therein.

SEC. 2471. Copies of the entries of a county clerk, as herein directed, when certified by him, and affidavits of publi cation, as herein directed, made by the printer, publisher or chief clerk of a newspaper, are presumptive evidence of the facts therein stated.

CHAPTER III.

SPECIAL PARTNERSHIP.

ARTICLE I.

FORMATION OF PARTNERSHIP.

SEC. 2477. A special partnership may be formed by two or more persons, in the manner and with the effect prescribed in this chapter, for the transaction of any business except banking or insurance.

SEC. 2478. A special partnership may consist of one or more persons called general partners, and one or more persons called special partners.

SEC. 2479. Persons desirous of forming a special partnership must severally sign a certificate, stating:

1. The name under which the partnership is to be conducted.

2. The general nature of the business intended to be transacted.

3. The names of all the partners and their residences, specifying which are general and which are special partners.

4. The amount of capital which each special partner has contributed to the common stock.

5. The periods at which such partnership will begin and end.

SEC. 2480. Certificates under the last section must be acknowledged by all the partners before some officer authorized to take acknowledgment of deeds; one to be filed in the clerk's office, and the other recorded in the office of the recorder of the county in which the principal place of business of the partnership is situated, in a book to be kept for that purpose, open to public inspection; and if the partnership has places of business situated in different counties, a copy of the certificate, certified by the recorder in whose office it is recorded, must be filed in the clerk's office and recorded in like manner in the office of the recorder in every such county. If any false statement is made in any such certificate, all the persons interested in the partnership are liable as general partners for all the engagements thereof.

SEC. 2481. An affidavit of each of the partners stating that the sums specified in the certificate of the partnership as having been contributed by each of the special partners have been actually and in good faith paid, in the lawful money of the United States, must be filed in the same office with the original certificate.

SEC. 2482. No special partnership is formed until the provisions of the last five sections are complied with.

SEC. 2483. The certificate mentioned in this article or a statement of its substance must be published in a newspaper printed in the county where the original certificate is filed ("recorded" in Montana), and if no newspaper is there printed then in a newspaper in the state nearest thereto. Such publication must be made once a week for four successive weeks, beginning within one week from the time of filing the certificate. In case such publication is not so made the partnership must be deemed general.

SEC. 2484. An affidavit of the making of the publication mentioned in the preceding section, made by the printer,

publisher or chief clerk of the newspaper in which such publication is made, may be filed with the county recorder with whom the original certificate was filed, and is presumptive evidence of the facts therein stated.

SEC. 2485. Every renewal or continuance of a special partnership must be certified, recorded, verified and published in the same manner as upon its original formation.

(In Montana the statutes added, "if not renewed it shall be deemed a general partnership.")

ARTICLE II.

POWERS, RIGHTS AND DUTIES OF THE PARTNERS.

SEC. 2489. The general partners only have authority to transact the business of a special partnership.

SEC. 2490. A special partner may at all times investigate the partnership affairs and advise his partners or their agents as to their management.

SEC. 2491. A special partner may lend money to the partnership, or advance money for it, and take from it security therefor, and as to such loans or advances has the same rights as any other creditor; but in case of the insolvency of the partnership, all other claims which he may have against it must be postponed until all other creditors are satisfied.

SEC. 2492. In all matters relating to a special partnership, its general partners may sue and be sued alone, in the same manner as if there were no special partners.

SEC. 2493. No special partner, under any pretense, may withdraw any part of the capital invested by him in the partnership, during its continuance.

SEC. 2494. A special partner may receive such lawful interest and such proportion of profits as may be agreed upon, if not paid out of the capital invested in the partnership by him, or by some other special partner, and is not bound to refund the same to meet subsequent losses.

SEC. 2495. If a special partner withdraws capital from the firm, contrary to the provisions of this article, he thereby becomes a general partner.

SEC. 2496. Every transfer of the property of a special partnership, or of a partner therein, made after or in contemplation of the insolvency of such partnership or partner, with intent to give a preference to any creditor of such partnership or partner over any other creditor of such partnership, is void against the creditors thereof; and every judgment confessed, lien created, or security given, in like manner and with the like intent, is in like manner void.

ARTICLE III.

LIABILITY OF PARTNERS.

SEC. 2500. The general partners in a special partnership are liable to the same extent as partners in a general partnership.

SEC. 2501. The contribution of a special partner to the capital of the firm, and the increase thereof, is liable for its debts, but he is not otherwise liable therefor, except as follows:

1. If he has wilfully made or permitted a false or materially defective statement in the certificate of the partnership, the affidavit filed therewith, or the published announcement thereof, he is liable, as a general partner, to all creditors of the firm.

2. If he has wilfully interfered with the business of the firm, except as permitted in article II of this chapter, he is liable in like manner; or,

3. If he has wilfully joined in or assented to an act contrary to any of the provisions of article II of this chapter, he is liable in like manner.

SEC. 2502. When a special partner has unintentionally done any of the acts mentioned in the last section, he is liable as a general partner to any creditor of the firm who has been actually misled thereby to his prejudice.

Sec. 2503. One who, upon making a contract with a partnership, accepts from or gives to it a written memorandum of the contract, stating that the partnership is special, and giving the names of the special partners, cannot afterwards charge the persons thus named as general partners upon that contract, by reason of an error or defect in the proceedings for the creation of the special partnership, prior to the acceptance of the memorandum, if an effort has been made by the partners, in good faith, to form a special partnership in the manner required by article I of this chapter.

Article IV.

ALTERATION AND DISSOLUTION.

Sec. 2507. A special partnership becomes general if, within ten days after any partner withdraws from it, or any new partner is received into it, or a change is made in the nature of its business or in its name, a certificate of such fact, duly verified and signed by one or more of the partners, is not filed with the county clerk and the recorder with whom the original certificate of the partnership was filed.

Sec. 2508. New special partners may be admitted into a special partnership upon a certificate, stating the names, residences and contributions to the common stock of each of such partners, signed by each of them and by the general partners, verified, acknowledged or proved according to the provisions of article I of this chapter, and filed with the county clerk and recorder with whom the original certificate of the partnership was filed.

Sec. 2509. A special partnership is subject to dissolution in the same manner as a general partnership, except that no dissolution by the act of the partners is complete until a notice thereof has been filed and recorded in the office of the county clerk and recorder with whom the original certificate was recorded, and published once in each week for four succes-

sive weeks in a newspaper printed in each county where the partnership has a place of business.

Sec. 2510. The name of a special partner must not be used in the firm name of the partnership unless it be accompanied with the word "limited."

In Montana statutes the section (§ 3343) corresponding to section 2510 of the California statutes differs somewhat, and reads as follows: "The business of the partnership shall be conducted under a firm name, in which names of the general partners only shall be inserted. If the name of any special partner shall be used in such firm name with his consent, or if he shall personally make any contract respecting or concerning the partnership with any person except the general partner, he becomes liable as a general partner."

CHAPTER IV.

MINING PARTNERSHIP.

Sec. 2511. A mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom actually engage in working the same.

Sec. 2512. An express agreement to become partners or to share the profits and losses of mining is not necessary to the formation or existence of a mining partnership. The relation arises from the ownership of shares or interest in the mine, and working the same for the purpose of extracting the minerals therefrom.

Sec. 2513. A member of a mining partnership shares in the profits and losses thereof in the proportion in which the interest or share he owns in the mine bears to the whole partnership capital or whole number of shares.

Sec. 2514. Each member of a mining partnership has a lien on the partnership property for the debts due the creditors thereof, and for money advanced by him for its use.

This lien exists, notwithstanding there is an agreement among the partners that it must not.

SEC. 2515. The mining ground owned and worked by partners in mining, whether purchased with partnership funds or not, is partnership property.

SEC. 2516. One of the partners in a mining partnership may convey his interest in the mine and business without dissolving the partnership. The purchaser, from the date of his purchase, becomes a member of the partnership.

SEC. 2517. A purchaser of an interest in the mining ground of a mining partnership takes it subject to the liens existing in favor of the partners for debts due all creditors thereof, or advances made for the benefit of the partnership, unless he purchased in good faith, for a valuable consideration, without notice of such lien.

SEC. 2518. A purchaser of the interest of a partner in a mine when the partnership is engaged in working it takes notice of all liens resulting from the relation of the partners to each other and to the creditors of the partnership.

SEC. 2519. No member of a mining partnership or other agent or manager thereof can, by a contract in writing, bind the partnership, except by express authority derived from the members thereof.

SEC. 2520. The decision of the members owning a majority of the shares or interest in a mining partnership binds it in the conduct of its business.

REVISED CIVIL CODE OF LOUISIANA.

TITLE XI.

OF PARTNERSHIP.

CHAPTER 1.

GENERAL PROVISIONS.

ART. 2801. Partnership is a synallagmatic and commutative contract made between two or more persons for the mutual participation in the profits which may accrue from property, credit, skill or industry, furnished in determined proportions by the parties.

ART. 2802. It may be made by all persons capable of contracting.

ART. 2803. It is regulated by the rules laid down in the title: of conventional obligations, in all things not differently provided for by this title.

ART. 2804. All partnerships are null and void which are formed for any purpose forbidden by law or good morals. But all the partners in such a partnership are liable *in solido* to third persons who may contract with them without a knowledge of the illegal or immoral object of the partnership.

ART. 2805. Partnerships must be created by the consent of the parties.

ART. 2806. A community of property does not of itself create a partnership, however that property may be acquired, whether by purchase, donation, accession, inheritance or prescription.

ART. 2807. The community of property created by marriage is not a partnership; it is the effect of a contract governed by rules prescribed for that purpose in this code.

ART. 2808. Property, when brought into partnership or acquired by it, and the profits when they are kept undivided for the benefit of the partnership, are called partnership stock.

ART. 2809. Property, credit, skill and industry being the sources from which a partnership may be drawn, each of the partners may furnish either or all of these in such proportions as they may mutually agree.

ART. 2810. By *credit*, in the foregoing article, is meant not only a reputation for responsibility as to pecuniary concerns, but also any quality or other circumstance that may acquire the good-will of others, and contribute to the prosperity of the partnership.

ART. 2811. It is of the essence of this contract that a profit is contemplated, and that each of the parties is to partake therein; the proportion they are respectively to receive is regulated by the stipulation of the parties, where they make any; where none are made for this purpose, the proportion is regulated by law.

ART. 2812. It is not necessary, under the last article, that the contract of partnership should provide for the actual partition of the profits. A stipulation that the profits shall be converted into stock for the benefit of all the parties in determined proportions is valid.

ART. 2813. A participation in the profits of a partnership carries with it a liability to contribute between the parties to the expenses and losses. But the proportion, like that of the profits, may be regulated by the stipulation of the parties; and where they make none, is provided for by law.

ART. 2814. A stipulation that one of the contracting parties shall participate in the profits of a partnership, but shall not contribute to losses, is void, both as it regards the partners and third persons. But in the case of a partnership *in commendam*, hereinafter provided for, the liability to loss may be limited to the amount of stock furnished.

ART. 2815. The foregoing article does not prevent the partners, or any one of them, from making a donation of

their or his profits arising from the partnership stock to another, or even from selling the same for a valuable consideration; but the donee or vendee is not on that account considered as a partner.

Art. 2816. A partnership cannot be executor, curator or tutor, and cannot exercise any other private office.

Art. 2817. By *private office*, in this code, is meant such trust as relates solely to the interest or affairs of one or more designated individuals, but which cannot be executed without the assent of the magistrate.

Art. 2818. The nomination of a partnership to any private office is not of itself void; where it is a trust susceptible of being exercised by more than one person, it shall be considered as a nomination of all the members of the partnership, individually, who belonged to it at the time of such nomination; where the trust can, by law, only be exercised by one person, the first-named partner shall be deemed to have been the person intended.

Art. 2819. A partnership may be appointed attorney or agent for the performance of any act or duty which comes within the object for which the partnership is formed; and the responsibility of such trust or agency attaches to all the members; and they are also entitled to all the advantages resulting therefrom, although one of them may execute the trust in the name of the partnership, unless it be differently provided in the appointment.

Art. 2820. Where a partnership is appointed to perform a trust or agency, foreign to the object for which the partnership was formed, the appointment is not void; it may be performed in the name of the partnership if all the partners assent, and then the like responsibilities and advantages attach to the parties as are set forth in the last preceding article; if the assent of all the parties be not given, the trust or agency cannot be performed under the power.

Art. 2821. If the trust or agency is executed by writing, whether required by law to be so done or not, the assent required by the last article must also be in writing.

ART. 2822. In an ordinary partnership, if a partner having no authority to make purchases for the joint account shall make any purchase in the name of the partnership or in his own name with the partnership funds, the other partners may elect whether they will take such purchase on the joint account or not.

ART. 2823. The partnership property is liable to the creditors of the partnership, in preference to those of the individual partner; but the share of any partner may, in due course of law, be seized and sold to satisfy his individual creditors, subject to the debts of the partnership; but such seizure, if legal, operates as a dissolution of the partnership.

CHAPTER 2.

RULES RELATING TO THE DIFFERENT KINDS OF PARTNERSHIPS.

SECTION 1.

OF THE DIVISION OF PARTNERSHIPS.

ART. 2824. Partnerships are divided, as to their object, into commercial partnerships and ordinary partnerships.

ART. 2825. Commercial partnerships are such as are formed:

1. For the purchase of any property, and the sale thereof, either in the same state or changed by manufacture.

2. For buying or selling any personal property whatever, as factors or brokers.

3. For carrying personal property for hire, in ships or other vessels.

ART. 2826. Ordinary partnerships are all such as are not commercial; they are divided into universal and particular partnerships.

ART. 2827. Commercial partnerships are divided into two kinds, general and special.

ART. 2828. There is also a species of partnership which may be incorporated with either of the other kinds, called partnership *in commendam*.

Section 2.

OF UNIVERSAL PARTNERSHIPS.

Art. 2829. *Universal* partnership is a contract by which the parties agree to make a common stock of all the property they respectively possess; they may extend it to all property, real or personal, or restrict it to personal only; they may, as in other partnerships, agree that the property itself shall be common stock, or that the fruits only shall be such; but property which may accrue to one of the parties, after entering into the partnership, by donation, succession or legacy, does not become common stock, and any stipulation to that effect, previous to the obtaining the property aforesaid, is void.

Art. 2830. A universal partnership of profits includes all the gains that may be made from whatever source, whether from property or industry, with the restriction contained in the last article, and subject to all legal stipulations to be made by the parties.

Art. 2831. If nothing more is agreed between the parties than that there should be a universal partnership, it shall extend only to the profits of the property each shall possess, and of their credit and industry.

Art. 2832. If commercial business be carried on under a universal partnership, it must, as to that business, be governed by the rules prescribed for other commercial partnerships.

Art. 2833. Universal partnership shall only be contracted between persons who are not respectively incapacitated by law from conveying to or receiving from each other, to the injury of others.

Art. 2834. Universal partnership cannot be created without writing signed by the parties, and registered in the manner hereafter prescribed.

SECTION 3.

OF PARTICULAR PARTNERSHIPS.

ART. 2835. *Particular* partnerships are such as are formed for any business not of a commercial nature.

ART. 2836. If any part of the stock of this partnership consists of real estate, it must be in writing, and made according to the rules prescribed for the conveyance of real estate, and recorded as is hereafter prescribed with respect to partnership *in commendam.*

ART. 2837. The business of this partnership must be conducted in the name of all the persons concerned, unless a firm is adopted by the articles of partnership reduced to writing, and recorded in the manner directed by the last article.

ART. 2838. If the articles be recorded, the parties may themselves adopt a firm which shall be composed of the name of one or more of the partners, but no other name than those of the parties concerned shall enter in such firm.

SECTION 4.

OF PARTNERSHIP IN COMMENDAM.

ART. 2839. Partnership *in commendam* is formed by a contract, by which one person or partnership agrees to furnish another person or partnership a certain amount, either in property or money, to be employed by the person or partnership to whom it is furnished, in his or their own name or firm, on condition of receiving a share in the profits, in the proportion determined by the contract, and of being liable to losses and expenses to the amount furnished and no more.

ART. 2840. He who makes this contract is called, with respect to those to whom he makes the advance of capital, a partner *in commendam.* Every species of partnership may receive such partners. It is therefore a modification, of which the several kinds of partnerships are susceptible, rather than a separate division of partnerships.

ART. 2841. The proportion of profits to be received by the partner *in commendam* may be regulated by the covenant of the parties, as may also, with respect to each other, the proportion of losses and expenses to be borne by each of the partners; but, as respects third persons, the whole sum furnished, or agreed to be furnished, by such partner, is liable for the debts of the partnership.

ART. 2842. In no case, except as is hereinafter expressly provided, shall the other partner who has no other interest in the concern than that of partner *in commendam*, be liable to pay any sum beyond that which he has agreed to furnish by his contract. If it has been paid and lost in the business of the partnership, he is exonerated from any other payment. If only part be unpaid, he is liable for that amount, and no more, to the creditors of the partnership.

ART. 2843. The partner *in commendam* cannot be called upon by the partnership or its creditors to refund any dividend he may have received of net profits (fairly made during the solvency of the partners and *bona fide*), at a time stipulated in the articles of partnership.

ART. 2844. The partner *in commendam* cannot bind the other partner by any act of his; he is not considered as a partner further than is specially provided in this section.

ART. 2845. Partnership *in commendam* must be made in writing, and must be recorded in the manner hereinafter directed, or otherwise the partner *in commendam* will be considered as a common partner in the concern, and will be subject to all the responsibilities towards third persons that would attach to any of the other parties in the business for which he made his advance.

ART. 2846. The contract must express the amount furnished, or agreed to be furnished, by the partner *in commendam*, the proportion of profits he is to receive, and of the expenses and losses he is to bear. It must state whether it has been received, and whether in goods, money, or how otherwise; and if not received, it must contain a stipulation to pay or deliver it. It must be signed by the parties in

the presence of one or more witnesses, and shall be recorded in full by the officer authorized to record mortgages in the place where the principal business of the partnership is carried on. If it be a commercial partnership, and consists of several houses or establishments, in different parts of the state, such recording shall be made in each of such places.

ART. 2847. The record mentioned in the preceding article shall be made in six days from the time of the execution of the contract, in the place where the principal establishment is situated, and if there are more than one, then allowing one day for every two leagues distance between such principal establishment and the others.

ART. 2848. The officer authorized to record mortgages shall keep a separate book for the purpose of recording acts of partnership, which shall be, at all office hours, open for the inspection of any person who may choose to consult the same, and shall receive the same fees to which he is entitled for the recording of mortgages and for certificates and copies. When the act is under private signature, the record shall be only made on the acknowledgment of the act, before a recorder, a notary, or the person authorized to make the record, or by a proof of the execution made in the same manner by one of the subscribing witnesses.

ART. 2849. The business of the partnership to which the partner *in commendam* has contributed his advance must not be carried on in the name of such partner, or in his name jointly with others, or by him or by his agency as agent, or attorney for the other partners, but by those to whom he has made the advance, and in their name or firm; and if the advance *in commendam* has been made to one person only, such person must carry on the business in his sole name, and must not make the addition "and company" or adopt any firm that may cause it to be understood that he has any partners.

And if the partner *in commendam* shall take any part in the business of the partnership, or permit his name to be used in the firm, or knowingly permit any single person to

whom he has made the advance to add any words to his name or firm that may imply that he has other partners besides the partner *in commendam*, when in fact he has none, such partner *in commendam* shall be liable to all the responsibilities of a general partner in the business for which he has made the advance.

ART. 2850. If the person to whom the partner *in commendam* has made the advance shall, without his consent, use his name in the firm, or if, nor having any other partner, he shall adopt or use any such addition as is expressed in the last preceding article, the partner *in commendam* may immediately withdraw the sum he has advanced, and, on giving notice in two of the public newspapers, shall be freed from all responsibility, either to the partners or to the third persons from the time of such notice.

ART. 2851. The partner *in commendam* cannot withdraw the stock he has furnished at a time when those to whom he has advanced it are in failing circumstances, or when there is a reasonable apprehension that they will become insolvent.

SECTION 5.

OF COMMERCIAL PARTNERSHIPS.

ART. 2852. All the provisions of this title are also applicable to commercial partnerships, except as otherwise provided for.

CHAPTER 3.

OF THE OBLIGATIONS OF PARTNERS TOWARDS EACH OTHER AND TOWARDS THIRD PERSONS.

SECTION 1.

OF THE OBLIGATIONS OF PARTNERS TOWARDS EACH OTHER.

ART. 2853. When a partnership is made without specifying any time for its commencement, it begins at the time the contract is made.

ART. 2854. If there has been no agreement respecting the time the partnership is to last, it is supposed to have

been entered into for the whole time of the life of the partners, under the modifications mentioned in article 2884; or if the partnership be entered into for some affair the duration of which is limited, for the whole time such affair is to last.

Art. 2855. The contract of partnership may depend upon conditions.

Art. 2856. Every partner owes to the partnership all that he has promised to bring into the same.

When this proportion consists of a certain thing, and the partnership is evicted from the same, such partner is accountable for it towards the partnership in the same manner as a seller is answerable to the purchaser who buys from him.

Art. 2857. The partner who promised to bring into the partnership a certain thing is bound, in case of eviction of it, in the same manner as a seller towards the purchaser who buys from him.

Art. 2858. The partner who promised to put a sum of money into the partnership owes the interest of the same from the day when he was bound to pay such sum.

In the same manner he owes the interest on such sums as he may have taken out of the funds of the partnership from the day he has received them.

Art. 2859. Any partner who has bound himself to bring into the partnership his skill, industry or credit, owes the partnership all the profits which he has made by the exercise of such skill, industry or credit, or of such proportion thereof as he was bound to furnish.

Art. 2860. When one of the partners is, for his own particular account, creditor of a person who is at the same time indebted unto the partnership for a debt of the same nature which is due likewise, the partner is bound to apply what he receives from the debtor to the discharge of what is due to the partnership and to him, in the proportion of both debts, although by his receipt he should have applied the whole sum paid to what is due to him in particular.

ART. 2861. When one of the partners has received his full share of what is due to the partnership, if the debtor has become insolvent since, the partner who has received his full share is bound to return the same to the partnership, although he should have given a receipt for his own share.

ART. 2862. Every partner is answerable to the partnership for the damages which it may have suffered by his fault, without being able to compensate such damages by the profits which his industry, skill or credit may have produced in the business of the partnership; provided that no partner shall be held liable for any loss which has happened in consequence of anything *bona fide* done or omitted by him in the legal exercise of his power, either as administrator or partner, although such act or omission should be injudicious and injurious to the partnership.

ART. 2863. If the use only of certain specified property has been brought into partnership, and that property is of such a nature that it may be used and enjoyed without destroying it, the ownership remains in the partner who brought it in and is at his risk. But if such property be destroyed, or grow worse by the keeping or the use that is made of it, if it was brought into partnership with the intent that it should be sold, or if it was taken at an estimated value ascertained by an inventory or some other writing, in either of these cases, although the use only was contributed, the property is at the risk of the partnership; and in case of loss or injury, the partner who brought it in is a creditor of the partnership to the amount of the credit or loss; provided that all the provisions of this article may be controlled by the covenants of the parties.

ART. 2864. A partner may be a creditor of the partnership not only for the sums which he has disbursed, but likewise for the obligations he has entered into *bona fide* for the partnership and for losses reasonably incurred in his administration.

ART. 2865. When the contract of partnership does not determine the share of each partner in the profits or losses,

each one shall be entitled to an equal share of the profits, and must contribute equally to the losses.

ART. 2866. If the partners have agreed to refer to one of them or to a third person for the regulation of the shares, this regulation cannot be annulled, unless it be by certain proofs that it is contrary to equity.

ART. 2867. The partner intrusted with the administration of the affairs of the partnership by a special power given in writing, either by the articles of partnership or otherwise, may, without the assent of the other partners and contrary to their prohibition, do any act which they have authorized him to do by such power, provided it be without fraud, and in his opinion for the advantage of the society.

This power, if contained in the articles of copartnership, cannot be revoked, without a lawful cause, as long as the partnership lasts. But if the power of administering be given subsequent to the articles of partnership, it is a simple mandate and may be revoked.

ART. 2868. When several partners are intrusted with the administration without their duties being pointed out, or when it is not expressed that one shall not be able to act without the other, they may do separately all the acts relating to such administration.

ART. 2869. If it has been stipulated that one of the administrators shall not do anything without the other, one alone cannot act, even when the other is prevented by sickness or otherwise from taking a part in the acts which relate to the administration, until there be a new agreement between the partners.

ART. 2870. When there is no agreement respecting administration in the act of partnership, the following rules are adhered to:

1. The partners are supposed to have given, reciprocally, to each other the power of administering one for the other; what one does is valid, even for the share of his partners, without receiving their approbation, saving the right which

they or every one of the partners has to oppose the operation before it be concluded.

2. Every partner may make use of the things belonging to the partnership, provided he employs the same to the uses for which they are intended, and he does not use them in such a manner as to prevent his partners from using them according to their rights, or against the interest of the partnership.

3. Every partner has a right to bind his partners to contribute with him to the expenses which are necessary for the preservation of the things of the partnership.

4. A partner can neither dispose of nor make any change in any real property belonging to the partnership, without the consent of his partners, should even this disposition or change be advantageous to the partnership.

5. In other than commercial partnerships a partner cannot as partner only, and if he has not the administration, alienate or engage the things which belong to the partnership.

ART. 2871. Every partner may, without the consent of his partners, enter into a partnership with a third person for the share which he has in the partnership, but he cannot, without the consent of his partners, make him a partner in the original partnership, should he even have the administration of it.

He is responsible for the damages occasioned by this third person to the partnership, in the same manner as he answers for those he has occasioned himself, according to article 2862.

SECTION 2.

OF THE OBLIGATIONS OF PARTNERS TOWARDS THIRD PERSONS.

ART. 2872. Ordinary partners are not bound *in solido* for the debts of the partnership, and no one of them can bind his partners, unless they have given him power so to do, either specially or by the articles of partnership.

Commercial partners are bound *in solido* for the debts of the partnership.

ART. 2873. In the ordinary partnership each partner is bound for his share of the partnership debt, calculating such share in proportion to the number of the partners, without any attention to the proportion of the stock or profits each is entitled to.

ART. 2874. If a debt be contracted by one of the partners of an ordinary partnership, who is not authorized, either in his own name or that of the partnership, the other partners will be bound, each for his share, provided it be proved that the partnership was benefited by the transaction.

ART. 2875. All engagements made relative to the partnership affairs, by the person appointed to administer the business of an ordinary partnership by articles of partnership duly recorded and pursuant to those powers, shall bind all the partners.

CHAPTER 4.

OF THE DIFFERENT MANNERS IN WHICH PARTNERSHIPS END.

ART. 2876. A partnership ends:

1. By the expiration of the time for which such partnership was entered into.

2. By the extinction of the thing, or the consummation of the negotiation.

3. By the death of one of the partners, or by his interdiction.

4. By bankruptcy.

5. By the will of all the parties, legally expressed, or by the will of any of them, founded on a legal cause, and expressed in the manner directed by law.

ART. 2877. When a partnership has been entered into for a limited time, it ends of course at the expiration of that time.

ART. 2878. The prorogation which may be agreed upon between the parties shall be made and proved in the same manner as the contract of partnership itself.

ART. 2879. If a partnership has been entered into the stock of which is to be formed with the proceeds of a sale, to be made in common, of several things belonging to each partner, and if it happen that the thing belonging to one of them is destroyed, the partnership shall be extinguished.

ART. 2880. Every partnership ends of right by the death of one the partners, unless an agreement has been made to the contrary.

ART. 2881. The death of one partner dissolves the partnership between the surviving parties, unless there be a contrary stipulation.

ART. 2882. If it has been stipulated that, in case of the death of one of the partners, the partnership should continue between the heir of the deceased and the surviving partners, or between the surviving partners only, either of these stipulations shall be observed.

But if the stipulation be that the partnership shall continue between the survivors only, the heir of the deceased shall be entitled to a division of the partnership property as it stood at the day of the death of his ancestor, and to a share in the profits of any partnership operation in which his share of the stock was employed, and which was unfinished at that time.

ART. 2883. The interdiction of one of the partners or his bankruptcy has as to the dissolution of the partnership, the same effect as the death of one of the partners.

ART. 2884. If the partnership has been contracted without any limitation of time, one of the partners may dissolve the partnership by notifying to his partners that he does not intend to remain any longer in the partnership, provided, nevertheless, the renunciation to the partnership be made *bona fide*, and it does not take place unseasonably.

ART. 2885. The renunciation is not *bona fide* when the partner renounces for the purpose of appropriating to himself the profits which the partners expected to receive from the partnership.

ART. 2886. The renunciation is made unseasonably if it be made at the time when things are no longer entire, and when the interest of the partnership requires that its dissolution be postponed. The common interest of the partnership is considered, and not the interest of the partner who opposes the renunciation.

ART. 2887. Although the partnership may have been entered into for a limited time, one of the partners may, provided he has just cause for the same, dissolve the partnership before the time, even where inconveniences might result for the partners, and although it might have been stipulated that the partners could not desist from the partnership before the stipulated time.

ART. 2888. There is just cause for a partner to dissolve the partnership before the appointed time, when one or more of the partners fail in their obligations, or when an habitual infirmity prevents him from devoting himself to the affairs of the partnership, which require his presence or his personal attendance.

ART. 2889. The renunciation of the partnership by one of the partners does not operate the dissolution of the partnership, unless it be notified to all the other partners.

ART. 2890. The rules concerning the partition of successions, the manner of making such partition, and the obligations which result from the same, between heirs, apply to partners.

APPENDIX B.

PARTNERSHIP FORMS.

The following simple form may prove suggestive. It is divided into distinct clauses, to a greater extent than might otherwise be thought advisable, in order to give prominence to each. A great variety of special clauses, not here included, are in use in special cases.

ARTICLES OF PARTNERSHIP.

This agreement, made this first day of January, A. D. 1894, between Adam Smith, Edwin Arnold and Robert Burns, all of the city of Ann Arbor, Washtenaw county, and state of Michigan, witnesseth:

1. The said parties hereby agree that they will become and be partners in business for the purpose and upon the terms hereinafter stated.

2. The firm name of the partnership shall be Adam Smith & Company.

3. The business to be carried on by said partnership is that of buying and selling dry goods at wholesale and retail, and carrying on a general dry goods business.

4. The place at which the said business is to be carried on is the said city of Ann Arbor.

5. The term for which the said partnership is organized is five years from and after February 1, 1894.

6. The capital of said firm is to be the sum of $15,000, of which each of the said partners is to contribute one-third part in cash, on or before February 15, 1894, and they are to share in the profits and losses of said business in the same proportion.

7. Each of said partners is to give his undivided time and attention to the said business, and is to use his utmost endeavors to promote the interests of the said firm.

8. Books of account of the transactions of said partnership shall be kept at the place of business, and shall be at all times open to inspection by any partner. Each partner shall cause to be entered upon said books a just and true account of all his dealings, receipts and expenditures for or on account of said firm.

9. In the month of January in each year, a full and complete inventory of stock shall be taken, and a complete statement of the condition of said partnership shall be made, and an accounting between the said partners shall be had, and the profits or losses of the preceding year shall be then divided and paid or contributed.

10. Each of said partners shall be permitted to draw from the funds of said firm the sum of $100 per month for his living expenses. Such sums so drawn shall be charged to him, and at the annual accounting shall be charged against his share of the profits. If his share of the profits shall not be equal to the sum so drawn, he shall pay the deficiency into the said firm.

11. Neither of said partners shall, without the consent of the others, compromise or release debts except upon full payment thereof, or engage in any unusual transaction or make any contract on the partnership account involving more than $500; or use the firm's name, credit or property for other than partnership purposes; or sign or indorse negotiable paper or become surety for third persons; or engage in any speculation; or knowingly do any act by which the interests of said partnership shall be imperiled or prejudiced.

12. All questions of difference as to the management of the business shall be decided by a majority of said partners, and no partner shall knowingly do any act in relation thereto contrary to the decision of the majority.

13. Either of said partners may retire from the said part-

nership at any time upon giving his said partners three months' notice of his intention so to do.

14. Upon the dissolution of said partnership, by reason of the death, withdrawal or other act of any partner, the remaining partners shall have the right to purchase the interest of such partner in the business, assets and good-will, by paying the value of such interest as determined by the last annual inventory and accounting, together with six per cent. interest upon such value since said inventory. Upon such payment the retiring partner or his representatives shall execute and deliver to the remaining members all necessary conveyances of such interest.

15. Upon the final dissolution of said firm by lapse of time or otherwise, the said business shall be wound up, the debts paid, and the surplus divided between the partners in accordance with their interest therein.

In witness whereof, we have hereunto set our hands, the day and year first above written.

Adam Smith.
Edwin Arnold.
Robert Burns.

NOTICE OF DISSOLUTION.

(To be published and also delivered to all previous customers.)

Notice is hereby given that the copartnership heretofore existing between Adam Smith, Edwin Arnold and Robert Burns, under the firm name of Adam Smith & Company, and doing business at Ann Arbor, Michigan, has been this day dissolved by mutual consent. [*If desired, add:* Robert Burns has retired from said firm and business, but the said Adam Smith and Edwin Arnold will continue the business at the same place and under the same firm name.]

Dated, Ann Arbor, Michigan, May 1, 1896.

Adam Smith.
Edwin Arnold.
Robert Burns.

CERTIFICATE OF LIMITED PARTNERSHIP.

(To be filed and recorded in office of the clerk of the county in which the principal place of business is to be located.)

The undersigned, being desirous of forming a limited partnership in pursuance of the statutes of the state of Michigan authorizing their formation (the same being chapter 78 of Howell's Annotated Statutes), do hereby make and severally sign the following certificate for that purpose:

1. The name under which the partnership is to be conducted is Adam Smith & Company.

2. The general nature of the business to be transacted is that of buying and selling dry goods at wholesale and retail.

3. The names of all the general and special partners are Adam Smith, Edwin Arnold and Robert Burns, and the place of residence of each is the city of Ann Arbor, Michigan. Of these partners, Adam Smith and Edwin Arnold are the general partners, and Robert Burns is the special partner.

4. The amount of capital which said Robert Burns has contributed to the stock of said partnership is $5,000 in cash.

5. The period at which said partnership is to commence is July 1, 1896, and the period when it will terminate is July 1, 1899.

In witness whereof, we have hereunto set our hands and seals this 25th day of June, A. D. 1896.

ADAM SMITH.
EDWIN ARNOLD.
ROBERT BURNS.

STATE OF MICHIGAN, } ss.
County of Washtenaw. }

On this 25th day of June, A. D. 1896, before me, a notary public in and for said county and state, personally came the above-named Adam Smith, Edwin Arnold and Robert Burns, to me known to be the persons named in and

who executed the foregoing certificate, and they severally acknowledged the execution thereof for the intents and purposes therein specified. RICHARD ROE,

Notary Public in and for Washtenaw County, Michigan.

AFFIDAVIT.

(To be filed with the above certificate.)

STATE OF MICHIGAN, } ss.
County of Washtenaw. }

Adam Smith, being duly sworn, deposes and says that he is one of the general partners named in the above certificate; and that the sum therein specified to have been contributed by Robert Burns, the special partner, to the common stock has actually and in good faith been contributed and applied to the same. ADAM SMITH.

Subscribed and sworn before me this 25th day of June, A. D. 1896. RICHARD ROE,

Notary Public [*as above*].

The county clerk then designates two newspapers in which notice shall be published, and the terms of the partnership, as set forth in clauses 1–5, are to be published for six weeks immediately after recording the certificate. Affidavits showing due publication are then to be filed with the county clerk.

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